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V. A. TUMANOV

Contemporary Bourgeois Legal Thought

**A Marxist Evaluation
of the Basic Concepts**



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INTRODUCTION

1. THE SUBJECT OF INQUIRY

Law is one of the vital components of social reality. A multitude of highly complex interrelationships link it with the basic spheres of public life. It embraces the system of the economy and its management, the political structure of society, the status of the individual, the machinery of state and, outside the framework of the individual state, it makes its presence felt in international relations.

In the present age, law has, for a number of reasons, become a focal point in the war of ideas, that is, in the sphere of ideology. Vladimir Ilyich Lenin, for example, pointed to the special place occupied by studies of the state in ideology.¹ Lenin's thinking on the subject, confirmed by the march of history, applies in full measure also to the ideological aspect of law, particularly in view of the close link-up between law and the machinery of government, between law and democracy, law and the maintenance of world peace in the age of nuclear weapons. The wide-ranging area in which law

¹ V. I. Lenin, *Collected Works*, Vol. 29, p. 472.

finds application today, endowing it with exceedingly complex social ramifications, signifies, moreover, that the bulk of the great political issues of the day, around which the ideological conflict between the differing socio-political systems, social classes, states and political parties revolves, all bear a clearly-defined legal aspect and often turn out to be problems of law.

The degree of importance and, consequently, the role of any social institution and the intensity of the ideological conflict it involves lend added significance to the scientific comprehension of its purpose and its work. And the answers supplied by comprehensive study of law to questions such as what exactly we mean by law, what is its social essence, its motive force, the way in which it evolves, its structure and its aims will determine in large measure whether it is seen as an instrument upholding social relationships that have outlived their time, as an instrument of reaction, or as a vital instrument of democracy, peace and social progress.

The present work sets itself the task of examining from the Marxist standpoint the approaches to these issues in contemporary bourgeois theoretical thinking on law. Our study, therefore, ranges over the basic concepts, the schools and trends in the area of the general theory, philosophy and sociology of law. This is but a part of the field covered by the ideology of bourgeois law, albeit a very important part. Bourgeois law ideology consists of layer upon layer. Much of it is of a lower order or what Plekhanov called the "order of primacy", i.e., related to the material and economic base of society, or as Plekhanov put it, the "sphere of property laws". Another part of it, again quoting Plekhanov, is ideology which, "if not of the order of primacy, cannot be said to be of the higher order either".²⁻³ And lastly, there are the legal doctrines concerned with general theory, philosophy and method which may be counted as ideology of the higher order. And of these doctrines, which loom large in our present work, one could say, to paraphrase Plekhanov, that while they cannot be ranked as belonging to the higher order, neither can they be classified as being of the order of

²⁻³ G. V. Plekhanov, *Selected Philosophical Writings*, Vol. I. Moscow, 1956, pp. 648, 650 (in Russian).

primacy. Consequently, whatever may be said of these doctrines, one cannot deny them the quality of highly complex constructs.

Many of these concepts and schools have already been critically reviewed and analysed in socialist literature. Marxist thinking has always closely and critically examined bourgeois law ideology in all its aspects and schools, and has done so because this ideology acts as an influential and, at times, vital component in the ideological arsenal of the bourgeoisie.

The author, having acquainted himself with previous inquiries into the subject, has aimed at presenting a more or less complete general picture of the contemporary schools of law predominating in the Western world. It will be obvious that the scale of the undertaking involves the risk of a certain skimming in assessments of some of the schools and problems. Sometimes one hears it said that the greater the number of trends subjected to critical examination, the harder it is to arrive at really satisfactory results.⁴

We, however, adhere to the view that for the purpose of pinpointing the basic general trends in present-day bourgeois thinking on the theory of law, that is its central aspects, some of the detail not fundamental to our task can well be sacrificed. The overall picture is needed if only for the purpose of correctly delineating the place occupied by a particular school or concept.

The idea has been to grasp the dynamics of the subject, to depict the evolution of the bourgeois thinking in the realm of jurisprudence, to trace the rise of the basic trends in the general theory, the philosophy and sociology of bourgeois law. This approach has a particular importance in the sense that, basically, these trends did not appear on the scene just yesterday or the day before. They have as a rule a background of decades, although it would be true to say that they have undergone modernisation, adapting themselves to the changed times.

The structure of the book derives from its purpose. The first chapter examines the essence, the main features in the

⁴ The Polish researcher: I. Wroblewski in the journal *Panstwo i prawo* No. 6, 1958.

evolution of the juridical world outlook (*juristische Weltanschauung*), described by Engels as the "classical world outlook of the bourgeoisie".⁵

The subsequent three chapters are concerned with the positivist and neo-positivist teachings and schools (Chapter II), sociological trends in jurisprudence (Chapter III), and, lastly, the natural-law and the axiological trends (Chapter IV). The list of the subjects examined in these chapters is indicative of the division in Western legal literature into the "general theory of law", "sociology of law" and the "philosophy of law".⁶ To this division, which, from our point of view is far from being satisfactory or conducive to a comprehensive assessment of law and the ways of its cognition, we shall return later. Here, we confine ourselves to saying that the terms "theory of law", "general theory of law", and "philosophy of law" are used in this book also in the broad sense, as synonyms for theoretical legal thought as a whole.

Another preliminary remark concerning the terminology. In Soviet philosophical literature one encounters fairly precise definitions which help to distinguish between such concepts as "doctrine", or "theory", "scientific school", "scientific trend" and "scientific movement". The basic element here is the "doctrine"; and as with any doctrine, be it founded by one man or by a group, it has its disciples who carry on the work and, in the process, form a school. The sum total of modifications of the same doctrine produced by different schools which not infrequently compete with one another, could be described as a trend. Scientific movement is the sum total of trends (and by the same token, the doctrines) which,

⁵ Marx/Engels, *Werke*, Bd. 21, Dietz Verlag, Berlin, 1962, S. 492.

⁶ As noted by W. Friedmann, "the many different trends of legal thinking can be divided into three principal types: first, there is legal philosophy proper, comprising all those theories which formulate legal ideals as the basis of a system. Second, there is analytical jurisprudence, which is essentially concerned with legal technique. Third, there are sociological theories, which are essentially concerned with the examination of the relations between legal principles and their functioning in society. These three principal trends of legal thinking have usually been in opposition to each other." (W. Friedmann, *Legal Theory*, London, 1960, p. 169.)

their differences notwithstanding, have certain basic ideas and viewpoints in common (as, for example, rationalism, empiricism and irrationalism in philosophy).⁷ In the present book, however, the author has not succeeded in making the scheme work.

The criticism of bourgeois legal theory is something more than participation in a scientific controversy. It is part of the global conflict of two ideologies—the communist ideology and the bourgeois ideology—a conflict that reflects the historical process of the transition from capitalism to socialism.

2. THEORIES OF LAW AND IDEOLOGY

In introducing the subject of our inquiry—modern bourgeois legal theories—we have referred to them as legal ideology. This calls for some explanation concerning the relationship between legal science in general, and the theory of law in particular, on the one hand, and ideology, on the other.

Most bourgeois law theorists would be hurt if someone were to relate their theories to the sphere of ideology. In Western literature it has long been the fashion to regard ideology and science as opposites. "Every ideology inevitably poses . . . the question of the nature of the state and law. This explains why the philosophy of law and ideology often bear a resemblance. And precisely because of this a careful distinction should be made between them." Such is the view of the West German jurist Fechner.⁸ His fellow countryman and sociologist Hofman asks: "What is the relationship between ideology and science?" And for Hofman there is but one answer: "They exclude one another. Ideology affirms, it provides no proof; it is affirmative. Science, on the other hand, is, in its method, a process of doubting. Ideology justifies, science doubts. Wherever ideology prevails, the scientific

⁷ T. I. Oiserman, "Philosophical Trends as a Subject of Research", *Uoprosy filosofii* No. 8, 1971.

⁸ E. Fechner, *Rechtsphilosophie*, Tübingen, 1956, S. 2. See also H. Kel-
sen, *Aufsätze zur Ideologiekritik*, 1964.

becomes an oppositional social principle."⁹ Another West German sociologist, Geiger, acknowledges that the concept "ideology" is, in a way, associated with the concept "theory". Only in correspondence with theory does the "ideology concept make sense".¹⁰ Even so, for Geiger ideology remains a "non-truth" theory, a "false theory". He even defines it as the theoretic expression of the categorical, and the concept of a correct ideology, in his view, is self-contradictory.¹¹

True, a given ideology may wander far from true theory, from the strictly scientific and, in general, may even run counter to the elementary rules of humanity, morality and logic, for example, the fascist ideology. But this is not to say that an evil viewpoint or theory ceases to be a viewpoint and theory. Nor does it signify that a sound theory or a world view in harmony with the needs of the times has nothing to do with ideology, that it is independent of certain social points of departure, aims and assessments. Ideology should be defined certainly not by epistemological characteristics—as true or non-true—but rather by the sociological, as the social consciousness of particular groups or classes enabling them to proclaim their position and status in society and, correspondingly, to declare their attitude to society and its various institutions (the opinions expressed will, obviously, not be devoid of epistemological aspects).¹²

In the opposite construct—"science is not ideology", "ideology cannot be scientific"—science is raised above the social reality; it is depicted as being a neutral and objective (but not entirely infallible) process of cognition, unaffected by political and other sentiments, whereas ideology is presented as being closely associated with political interests, apologetics, propaganda and even utopias. Bourgeois writers frequently refer to the fact that Marx and Engels treat the concept of ideology as illusory, inadequate and, consequently, a

⁹ W. Hofman, "Wissenschaft und Ideologie", *ARSP* No. 2, 1967, S. 205.

¹⁰ T. Geiger, *Arbeiten zur Soziologie. Methode, moderne Grossgesellschaft, Rechtssoziologie, Ideologiekritik*, Berlin, 1962, S. 422.

¹¹ *Ibid.*, S. 414, 420.

¹² See T. L. Zhivkovich, *The Theory of Social Reflection*, 1969, pp. 437-48 (in Russian).

non-scientific reflection of the real world. But the Soviet writer Rumyantsev draws attention to the two different senses in which the term "ideology" is used. "Social science is ideological, first, because it depends on the social milieu and on the actual requirements and interests engendered by the latter, and, second, because it is not conscious of this dependence and claims complete sovereignty of thought. . . . What Marx and Engels objected to, of course, was ideological subjectivism, the unjustifiable separation of social science from its historical roots. As regards the 'ideologism' of science in the sense of its being determined by the material-social relationships, that is simply a natural historical fact which cannot be overlooked. In using the concept of ideology in a negative sense Marx was criticising not this fact but the illusions beclouding it."¹³ At the same time, Rumyantsev underlines the complexity of the problem of the correlation of social knowledge and ideology.

In legal science, as in the other social sciences, there are problems which are of no special importance as regards ideology. P. I. Stučka, a pioneer of Soviet law, for example, divided jurisprudence into theory and technique.¹⁴ The borderlines of this division are fairly mobile, and the history of law is not without examples of issues, mainly of a juridical nature, which prove to be the starting point for complex ideological processes (for instance, problems associated with making good deficiencies in interpreting the "autonomous law movement"). By and large, however, jurisprudence is ideological (with the above reservation concerning the division of ideologies into higher and lower categories), this being

¹³ A. M. Rumyantsev, *Problems of the Contemporary Science of Society*, Moscow, 1969, p. 318 (in Russian).

¹⁴ P. I. Stučka, *Selected Works on the Marxist-Leninist Theory of Law*, Riga, 1964, p. 214 (Russ. ed.).

In his *Ideological Struggle and International Law* (Moscow, 1967, p. 13, in Russian), Professor G. I. Tunkin, though referring to international law, makes the following point which is applicable to law as a whole. "In the science of international law and in its practice problems are encountered of which it can be said that they relate wholly to ideology, and there are those that relate both to ideology and to other aspects, and lastly, there are problems which in themselves have little bearing on matters of world outlook and reflect ideology merely in the general approach to the particular problem or problems."

to a considerable extent predetermined by the subject of the inquiry.

In fact, doctrine relating to the essence of law and its role in the affairs of society is always found wherever ideology and jurisprudence appear as two independently acting but closely intertwined social phenomena.

The British Marxist Maurice Cornforth makes the point that the process of forming ideology and its development includes both the process of forming more or less truthful ideas critically through practical experience and interaction with things and the process of forming more or less illusory ideas as preconceptions applied in the formation of views. Both processes are indissolubly linked. On the one hand, insofar as the interests of a class do demand a true apprehension of reality based on critical investigation of some kind, its ideology does contain a scientific element. On the other hand, insofar as the interests of a class and the place it occupies in social production give rise to certain preconceptions and illusions which serve the class in its struggle, its ideology is illusory. The opposition and interpenetration of the scientific and illusory elements in ideology cannot be conceived so simply, as if ideas about one thing were scientific while ideas about some other things were illusory. The fact is that the scientific and the illusory elements oppose each other and interpenetrate in the ideas formed about one and the same thing.¹⁵ These points apply in full measure to the totality of bourgeois ideas and doctrines on such a complex subject as law.¹⁶

When bourgeois writers on law (for example, H. Kelsen) oppose science to ideology, and the objectivity of science to

¹⁵ M. Cornforth, *Dialectical Materialism*, Vol. III, London, 1969, pp. 77-79.

¹⁶ "The ideological process in which various legal theories and doctrines have taken shape has also included a process of cognising the social and particularly the legal relations between people. . . . The very elaboration of the juridical categories has cognitive significance. There can be no doubt that the steady advance of legal consciousness (*Rechtsbewusstsein*), expressed and embodied in all the more developed forms of law and court procedure, is associated to some extent with application of the knowledge, gained in jurisprudence and legal practice, of the actual social relationships subject to legal regulation." (V. Kelle, M. Kovalson, *The Forms of Social Consciousness*, Moscow, 1959, p. 80, in Russian.)

partisanship, they are motivated by the desire to deprive Marxism and Marxist theory on state and law—a theory which proudly proclaims its class and ideological nature—of its title as a science. Marxism, on the other hand, in its evaluation of bourgeois theories, scorns such primitive methods. Certainly it refers to them as legal ideology, but it never deprives them of their scientific title. Naturally, it places the accent on the social orientation of these theories, on the boundaries within which the orientation confines the further evolution of the science of law. It readily acknowledges the role they play in the evolution of the ideas without which the political ideology, in the shape of the system of views and programme postulates of the bourgeoisie, is impossible.

In their response to the Marxist critique of bourgeois legal theories, some Western writers contend that the evaluations in the socialist writings on the subject derive not from the scientific analysis but rather from political and ideological attitudes. Typical in this respect is an article by Michael Jaworskyi under the heading "Soviet Critique of the 'Bourgeois' Philosophy of Law".¹⁷

Indeed, criticism made from a political and ideological angle and criticism based on science may not coincide; and in the above-mentioned highly emotional article by Jaworskyi, we have a striking example of this. The author tries to defend against Marxism the natural-law doctrine, the psychological school, sociological jurisprudence and normativism. Since the theoretical approaches of these schools differ and they are united only by their social orientation, it will be obvious that any simultaneous defence of the four trends is possible solely from the political and ideological standpoints.

Moreover, for Marxism it is axiomatic that both the scientific and the political-ideological approaches can function in an organic unity. Marxism has never concealed the fact that its measure of bourgeois legal science is that of the political

¹⁷ *Osteuropa-Recht* No. 1, 1960. M. Villey likewise claims that Marxist writers underestimate the scientific significance of Western writing on the subject and this is because their approach is primarily political (*APhd*, Vol. 12, 1967, p. 208).

and the ideological, that one of its basic functions is to bring into clear relief the political and ideological sources of its opponents. And it does so by way of a searching and scrupulous analysis of the corresponding doctrines, theories and views, an analysis, which is, moreover, based on clearly defined scientific postulates, whether philosophical or sociological. Thus, the charges levelled against Marxism of denigrating the scientific approach and lauding the political and the ideological cannot be substantiated.

3. THE MULTIPLICITY OF SCHOOLS

The purpose of our investigation—to make a detailed analysis of the legal theorising of the main Western schools—is made more complex by the multiplicity of the schools. And even when we grant the hiving-off into trends and schools as part of the development of science, we are forced to conclude that such multiplicity, such pluralism, as we find in this field, has reached a state of hypertrophy, became inflated out of all proportion.

This situation is not without pitfalls for the unwary investigator. Confronted with an ever-swelling pluralism, he runs the risk of concentrating too much on a detailed classification of sub-viewpoints and sub-schools, on distinctions and nuances marking off one system from the other. Frequently these distinctions, coming at a dozen or more removes from the subject-matter, have hardly any bearing at all on the really vital approaches. In Western literature on the subject, one frequently encounters systems which, though brashly claiming originality, turn out to be mere compilations, often of a highly eclectic nature, worked up from papers left by predecessors or supplied by fellow writers on the subject.

Clearly, it will be necessary to single out—as we shall do in this book—the basic trends in modern bourgeois legal thought, the really important schools and teachings evolving from these trends and from the points where their thinking coincides.

An interesting point is that even in the works of those Western authors who make a thorough examination of these

trends and schools the reasons for the pluralism are left unexplained. It is regarded as being self-explanatory and in some instances is associated in somewhat shamefaced way with the "unending struggle for truth".

In point of fact, the pluralism of schools may be attributed to a whole series of interacting and closely-related social, historical and epistemological factors. These must now be briefly summarised.

As noted in Soviet literature on the subject, the variety of doctrines and theories in bourgeois political and legal ideology reflects the diversity of the social sources from which the class of the bourgeoisie stems, the presence within it of strata and groupings, all differing in viewpoints and in political objectives.¹⁸

This proposition may be extended to include the legal reflection of historical differences, between the bourgeoisie and the feudal nobility, for instance. The natural-law doctrine, the *Rechtsstaat** theory and, equally, the famous "laissez-faire" cannot be explained without reference to the rivalry and competition frequently ending in compromise between the bourgeoisie and its feudal opponents. The feudal standpoint also found ideological expression in specific theoretical concepts, of which the historical school of law might be cited as an example.

However, going back to the different strata in the composition of the bourgeoisie itself as a source of the pluralism in its law theories, we observe that its stratification into big, middle and petty bourgeoisie, the breakdown of big capital into various groupings, is reflected most clearly in a law ideology of the "lower order", the order of primacy, that is, in matters of a more or less direct practical, functional significance.

This is plainly evident in the numerous theories of civil and agrarian law, where the conflicting economic interests of

¹⁸ See, for example, *History of Political Doctrines*, Moscow, 1960, p. 828 (in Russian); G. I. Tunkin, *Ideological Struggle and International Law*, p. 9.

* The German term is sometimes rendered in English as "state acknowledging the rule of law", "constitutional state" or "legal state".—*Tr.*

the investment spheres and of people belonging to the different strata of the bourgeoisie often clash.

However, when we come to the legal ideology of the "higher order", to the area of the general theories of law and the state, reflection of the stratification within classes is harder to come by. But that it exerts a definite influence and makes itself clearly felt whenever new teachings come to the fore, is beyond doubt. Still, any attempt at a more or less complete classification of the basic theories of law as directly reflecting the interests of the different sections of the bourgeoisie—big capitalist, medium-sized or small businessman—would either end in utter failure or in a vulgarised, oversimplified sketch of the Shulyatikov type.¹⁹

Such a sketch would be at variance with at least two of the laws governing the development of ideology. One of these is that ideological development is conditioned above all by the nature and circumstances of the struggle waged by the particular class against the standpoint of its opponents. For instance, after a relatively brief interval, with compromise reached and subsequent intermingling of bourgeoisie and feudal aristocracy, the impulse to the evolution of bourgeois ideology emerges from the new bourgeois-proletariat relationship, the relationship of capitalism versus socialism. The new milieu then becomes the arena of a concentrated drive for ideological sway, reflecting the changes in social life (including the greater social awareness among larger numbers of the public), and also the urge to miss no opportunity in defending capitalism against all its ideological opponents. This drive, these promptings—alike in their historical consistency and in their thematic diversity—are more broadly responsible for the plurality of schools and trends than the internal class groupings among the bourgeoisie.

The second law concerns the relative independence of ideology, which increases as we move up the ideology hierarchy. And here, too, there are two points that merit attention.

First, having originated under the influence of particular class interests and in specific circumstances, the theoretic ideological conceptions tend thereafter to develop relatively

¹⁹ See V. I. Lenin, *Collected Works*, Vol. 38, pp. 486 ff.

independently, adapting to the new surroundings and, when transplanted to other countries, undergo modification and change. And since the dominant role falls to those that have stood the test of time, it is not surprising that they should display the greater relative independence and, from this pedestal, adapt to the conditions and requirements of the different strata of the bourgeoisie.

Second, the process of reflection of the common class standpoints in the ideologies of the higher order is an involved process which is effected by such weighty factors as continuity and interplay of ideological forms, by the logic of scientific development and the ever-increasing social role of intellectuals in providing the thinking representatives, the spokesmen of the different classes. Ideology is theoretical thinking, from which it follows that, due to the specific nature of the thinking, some legal theories, especially the philosophy of law, may easily assume a purely epistemological character, whereas others may go a fairly long way from direct class interests, while adhering to the overall class outlook of the bourgeoisie.

It should be added that here we have in mind the sociopolitical impact of schools and doctrines, and not the political views and standpoints of scholars expounding them. In view of the relative independence of scientific ideology, especially at the "higher levels", it is possible to find people differing in political views in one and the same trend. True, their political convictions would be likely to leave their mark on their concepts, but again within the frame of common wellsprings of theoretical thought.

The multiplicity of bourgeois teachings also plays a part in exerting ideological influence. Lenin in his article on the state expressed the view that it would be hard to find another subject so confused, deliberately and otherwise, by representatives of bourgeois science, philosophy, jurisprudence, political economy, and so on.²⁰

The development of this thought in Soviet writing and especially by the author of the present work,²¹ impelled one

²⁰ V. I. Lenin, *Collected Works*, Vol. 29, pp. 470-71.

²¹ V. A. Tumanov, *Critique of the Modern Bourgeois Theory of Law*, Moscow, 1957, p. 15 (in Russian).

Western author to make this rejoinder: "Mr. Tumanov ascribes the multiplicity of theories to the ill-will of Western bourgeois law experts whose purpose is allegedly to mask the exploitive nature of bourgeois law. This argument, however, is hardly as convincing as the author believes. For the reader will feel impelled to ask: Would it not be more natural and effective for the capitalist regime, if it wished to mask the exploitive nature of bourgeois law, to rely on a single theory which, by virtue of its homogeneity, would have a much greater effect on the public than a fanfare of ill-assorted opinions?"²²

We readily grant that any attempt to ascribe the existence of multiform bourgeois law theories to the deliberate design or ill-will of their authors, would be an oversimplification. However, this aspect should not be confused with another, namely, that of using the numerous schools that have already taken shape in the process of ideological brainwashing generally and in the education process in particular. The person undergoing such ideological treatment, and this includes the student, has to choose between alternatives all of which serve the purposes of the treatment. This is to say nothing of the fact that the multiplicity of answers, with one casting doubt on the other, must inevitably give rise to unbelief in the possibility of solving the problem.

Moreover, the history of bourgeois society is not without examples of particular situations in one or another country being used for plugging a "homogeneous theory", for example, the nazi racial theory of law. It frequently happens that a "fashionable" conception relegates the others to the background. Much has been heard in recent years, as we shall see below, about "integrating" the bourgeois schools of law. But this by no means precludes the possibility of using the multiplicity of schools for ideological brainwashing.

When we advance the historical factor as one of the reasons for the multiplicity of schools, we have in mind two things: the supplanting of one theory by another in the course of the long evolution of capitalist society and its statehood, and the specific historical features of the evolution of legal thought in particular countries.

²² *Osteuropa-Recht* No. 1, 1959, S. 54.

Jurisprudence, as a science in its own right, has functioned in Western countries for at least 150 years. Throughout this period it, like the other social sciences, has had to renew and renovate itself. Practically all the major changes in the history of capitalism have been accompanied, or followed, by the appearance of new legal concepts and schools of law.

What interests us at the moment is that the numerous concepts and schools that have appeared in the world (although, obviously, not all of them) are in no hurry to retire from circulation which, naturally, makes for a still greater plurality. This has various results. For instance, when a trend or school is deprived of its previously leading role as a result of change—it may nevertheless carry on in much more modest circumstances.

Having yielded ground to newcomers, and perhaps having abandoned the scene altogether, a school may make a comeback and succeed in adapting itself to the changed social conditions. A rather striking example of this was the “resurrection” of natural law, or the active utilisation after the Second World War of the *Rechtsstaat* theory.

There have also been instances of a “revived” theory coming to the fore again and displaying much greater vigour than previously—a case in point being the neo-Thomist concept of law. While it is true that bourgeois law theory has never been totally free of fideist tendencies and influence, it has on the whole, ever since the time of the bourgeois revolutions, developed as a rationalist science as distinct from religious metaphysics. But things have changed. And it is not simply the fact that nowadays one finds among law theorists writers with clerical sympathies. The really significant thing is that in many respects the tone in contemporary bourgeois law theory is actually set by neo-Thomists. But not even clerico-political doctrine has remained untouched by the winds of change; its ideological and organisational strivings, which are powerfully supported, are designed to adapt the doctrine to modern requirements, to renew it, present it as the “third way” and generally to reinvigorate religion by taking advantage of the favourable circumstances that took shape after the Second World War. But in the social context, the modernisation cannot alter the fact that bourgeois legal thought has made considerable concessions to theology.

The persistence with which these schools cling to life is reinforced also by factors of a subjective nature—the position of authority, the resolve of the antiquated schools to keep going for ever, and, lastly, by ideological borrowing. Often enough, concepts and schools which have lost standing in their original habitat find acceptance in greener pastures. A case in point is G. Kelsen's "pure theory of law", which, declining in popularity in European jurisprudence, has gained ground in Latin America.

It sometimes happens that the power of certain schools to survive is not based on the inner logic of the development of science, not connected with increased knowledge of the subject and research in that particular field, but is solely due to the ideological and propaganda utility of the school in question. The ideological requirements, interests, and traditions of the dominant social forces may for a time prove to be stronger than the advance of scientific knowledge.

For example, at the turn of the century when the organic theory of the state was dismissed by most of the outstanding bourgeois writers as belonging to a past stage,²³ it received a shot in the arm, so to speak, from German militarism then on the look-out for an ideological justification for its expansionist policy.

Plurality also arises from the long life that some schools enjoy. As a rule, the more ancient the school the less monolithic it is, and the more elaborate its internal differentiation. It divides into two streams—one more conservative and stable, the other dynamic and tending towards a faster modifying process. And the greater the following of the school the more varied the moves with which it responds to social change, and the more eclectically it combines and links up with other trends in socio-political thought, quite frequently

²³ For example, G. Jellinek observed that since organic theory operates chiefly with analogies and is not in a position to provide real knowledge, it would be more rational to reject it out of hand because the danger of a false analogy is greater than the advantages of a sound one. Even more emphatic was L. Gumplowicz who described the organic teaching as "utterly fantastic" and as indulging in a plethora of "empty phraseology" (*General Teaching on the State*, St. Petersburg, 1910, pp. 31-40, in Russian).

ending by breaking up into sub-schools all claiming independence.

The plurality of schools is enhanced also by the influence exerted by those specifically historical, national features which inevitably emerge in the development of law thinking generally. We have in mind that, due to the socio-political, historical and other features (including such factors, as the national psychology, way of life, traditional forms in education and science) prevailing in one or another country, the legal ideology there acquires specific forms of expression which, in time, give rise to particular trends or home-made variants, thus adding to the totality of the global trends. And these specifically historical features often play a highly significant role whenever another new theory makes its appearance.²⁴ With the passage of time, the new theory takes the path of a relatively independent development, acquires a more general form, and may accommodate itself to a situation quite different from that of its origin.

For instance, the historical school, when it first made its presence felt, reflected the social conditions of the feudal-monarchical system which as yet knew little of capitalism. Prussia can be taken as a typical example of a society of this nature in which, in the course of the Napoleonic wars, conditions were complicated by the national enmity displayed towards France—then the standard bearer of the new bourgeois ideas. A point worth noting, however, is that subsequently the influence of the historical school was felt not only in those countries where, as in Germany, it was needed to bolster up the feudal monarchy (for example, Russia),²⁵ but also in other countries, including the United States with its totally

²⁴ When it first announced its arrival, the theory of institutionalism, for example, was intimately associated with the political conditions in France both before the 1914-18 war and after.

²⁵ In Russia, as distinct from Germany, where the expansion of capitalism, contrary to the basic tenets of the historical school, was accompanied by codification of the law, these ideas exerted a certain influence on law development, as is evident in the codification effected by Speransky and especially in the publication of the massive forty-five volumes of a complete collection of laws in chronological order. The historical school, however, had but slight influence on the subsequent development of Russian jurisprudence which, it should be said, was not overtly distinguished for nationalist features.

different historical background and way of life. The historical school and its ideas figured prominently in the work of D. Pomeroy and J. Carter and other American writers on law. Early in the last century, when the question of rejecting the English common-law system had become the subject of heated debate (the logical continuation of the independence struggle) the opponents of the proposition found ammunition to hand in the ideas of the historical school.

When extended to a different set of historical or other conditions, kindred theories often sound quite different, develop along different lines, and pursue different objectives. The end result is that the theory itself becomes affected; various schools and sub-schools hive off from it, with the result that the conceptual composition of bourgeois law theory becomes increasingly complex.

In the psychological theory advanced by L. Petrazycki, the so-called intuitive law—law emanating from the psychological experience of the individual—is counterposed to, or compared with, the official, positive law, with the purpose of focusing attention on the imperfections of official law in the Russia of those days. Petrazycki's plea was that none other than Russia (as distinct from any other European country) should be the "kingdom of intuitive law *par excellence*".²⁶

His theory, in effect a bourgeois critique of the semifeudal, archaic system of law in Russia, derived from a psychological interpretation of law; it was in the nature of a bourgeois liberal teaching, and although the author's political stance was that of a moderate Constitutional Democrat (*Kadet*) his theory derived, partly, from the progressive social processes fermenting in Russia on the eve of the 1905 revolution.²⁷

²⁶ L. Petrazycki, *Theory of Law and the State in Connection with the Theory of Morality*, Vol. 2, St. Petersburg, 1907, p. 618 (in Russian).

²⁷ In Poland, as noted by G. Seidler, "in the interwar years psychological theory, whose chief exponent was Jerzy Lande (a professor of law theory at Jagiellonian University), attracted a considerable following among progressive lawyers. Carrying on from Petrazycki, they combated, on the one hand, the racial concepts in law, and, on the other, sought in psychologism a rational method of research with which to combat fideism" (G. Seidler, *Doktryny prawne imperialismus*, Krakow, 1961, p. 51).

In the German literature on jurisprudence during the first decades of this century, the psychological theory of law sounded in a completely different key, although outwardly the first impression was that of approximation to the general proposition.

A. Sturm, for example, expressed the view that the purpose of a philosophy of law could only be the sensation of law, that as a psychological phenomenon this sensation develops in spirals, the nether point of which is the mental life of the savage, its highest being the modern German's sense of law. German law, he claimed, stands higher than that of any other country. From this lofty elevation Sturm proclaimed the "psychological theory of law as a German theory, either it is that or it never shall be a theory".²⁸

At times the national, concrete-historical features of one or another country result in a situation in which a theoretical construction, accepted as a result of an intertwining of ideologies, acquires a clearly defined and specific shape. Thus, for example, although the basic idea of the American realist school of law (Oliphant, Frank and others) is merely acceptance of the general aspects of the sociological jurisprudence which originated earlier in Europe, nevertheless it has become so Americanised that the realists are generally regarded as an independent school functioning within the framework of the trend. And the point that in this case we are concerned with strictly "local" influences is confirmed by the fact that the realist school has no counterpart in the jurisprudence of other countries, including English-speaking countries.

It would be unwise, however, to read too much into these aspects. They are part of the common development. The basic political and legal concepts of the bourgeois world are in each instance worked out and perfected by the combined efforts of the ideologists of many countries. Community prevails over the specific features of the growth of legal ideology in any one of the advanced countries. It appears that these features or peculiarities are even less important than the differences in the systems of law, especially if one thinks in

²⁸ A. Sturm, *Die Psychologische, Grundlage des Rechts*, Hanover, 1910, S. 7.

terms of the continental systems, on the one hand, and the common-law systems, on the other.

This community of bourgeois theories of law and uniformity of their evolution derive from their having one and the same socio-economic base, the same class role being played by the legal superstructure. As progress is made in the theory and practice of socialism, the bourgeois legal ideology displays a constantly growing tendency towards consolidation and internationalisation, naturally, within the boundaries of the capitalist world.

The means by which this community is achieved are, first, the mutual ideological influencing, which is a regular feature of progress in ideology and legal science, second, the acculturation of law (reception of legal institutions leads logically to reception of legal doctrines), and lastly, what might be described as "ideological infiltration", that is, ideological influence resulting from the external ideological functions of the state.²⁹

Today, there is much in the evolution, the "migration" and movement of ideological trends that cannot be understood or explained without taking cognisance of this "ideological infiltration".

Epistemological factors play an important part in explaining the plurality of law theories. First, there is the complexity of the legal superstructures in highly-developed societies. The investigator who undertakes to study legal practice and reflect on it will encounter a series of components which, never static and differing sharply from one another, display complex interconnections of both a one-way and two-way nature.

This is law in the real sense, that is, the sum total of norms inaugurated or sanctioned by the state and retained by it by special measures, including compulsion. It is the sphere of wide-ranging and constantly operating legal relationships. It is, moreover, the sphere of application of the law, the functioning of the vast machinery of justice, when the law is violated or the normal functioning of one or other of the legal relationships is held up. And it is, lastly,

²⁹ For a detailed examination see G. A. Arbatov, *The War of Ideas in Contemporary International Relations*, Moscow, 1973 (in Russian).

the sphere of awareness of the law, of the attitude of individuals, social groups, strata and classes to the law.

In their turn, each of these components has its own complexity. In the actual process of law-making legal practice plays a considerable part alongside that of the legislator. In cases when practice plays the dominant part, the origin of law and notions concerning it may acquire highly individual features. The simple reflection of actual life in law is interwoven, particularly in developed legal systems, with social creativity (the desire to develop existing relations). This is actually a process of adjustment according to certain norms, plus ideological influence. The main branches of law differ widely and, depending on the preponderance of one or the other, the system of justice as a whole undergoes perceptible modification.

Due to the specific form in which the norms are set out, the relationship between content and form is, likewise, extremely complex; so much is this the case that the form could even acquire at least a seeming independence. Legal relationships emerge as a result of a complex combination of the relationships which take shape between people in the specific socio-economic and political conditions, and the influence exercised upon them by the legal system. Among these we find the social relationships in the sphere of material production, distribution and exchange, and in other spheres of public life which simply assume legal forms, and also those social relationships which owe their existence to the legal norms and, are the outcome of their application. And, lastly, legal consciousness can be regarded as an aspect of social consciousness, individual consciousness and as social psychology. It is associated also with legal ideology. Moreover, legal consciousness may be regarded both as deriving from law as such, and as a law-making factor.

The whole of this variegated legal scene is further complicated by the specifically historical features which, even within the bounds of a particular type of law, result in the emergence of entirely different kinds of law (classical examples are the continental and the Anglo-Saxon legal systems); also, and of still greater importance, the evolution of law and, correspondingly, the changes it undergoes in the history of a class-divided society, replacement of socio-historical

formations and their evolution. No matter how deeply rooted in juridical thinking the tendency to regard law as eternal, law, like everything else, is subject to change, the change affecting its social content, its forms, functions and its relationship to other elements of the superstructure; and the culmination of this process is that its aspects, branches and features emerge in a new shape.

Nor should one lose sight of the fact that law is but one of the components (true, an exceedingly important one) of the normative regulation of public life. The behaviour of people in society is also regulated by a number of other norms and rules; some of them are quite explicit (for example, the regulations of non-government organisations), while others find spontaneous expression in the numerous manifestations of social consciousness. It will be recalled that at certain times in history, diffusion of law in generally-accepted public norms has prevailed over its separation from the totality of moral, ethical, religious, traditional and other rules of conduct.

While it is true that in the more developed state-organised societies the independence of law is typical, nevertheless the kinship of the law with the other norms of social conduct is complex and fluid and both the kinship and the interaction are such that they can leave an unmistakable imprint on the legal system, on its main branches and institutions.

In recent Soviet writing on the subject the many-sidedness of law is strongly accented, law being regarded as a complex social entity, as a dynamic system.³⁰

In this complexity and multiformity there lurks the objective possibility, in both the logical and the historical process of scientific cognition, of overstressing the actual significance of one or another component of law and presenting it as the very essence of law and its main direction of development.

However, for this epistemological possibility to become reality there must be factors of a methodological and, in the ultimate, of a socio-political nature.

³⁰ V. M. Chkhikvadze, *The State, Democracy and Legality. Lenin's Ideas Today*, Moscow, 1972, pp. 292-93 (in Russian).

The main methodological factor capable of turning this possibility into reality is the formal-logical and, in this sense, metaphysical approach to the complex social phenomenon of law. The researcher who adopts this standpoint will fail to see the basic social determinants governing the development of law, and since formal logic provides no criteria that would enable us to establish which of the numerous qualities of the subject merits recognition as being the heart of the matter, he will take the liberty of selecting arbitrarily, as fundamental to an exposition of the essence of law, any one of the particular qualities or components. On the other hand, any attempt to take more than one component as basic is bound to produce an eclectic concept.

When we take a closer look at the basic trends in bourgeois law theory, we shall see that (a) positivism views law as an absolute, as a totality of norms, isolates it from meta-juridical factors and, in the end, arrives mainly at an analysis of law as a logical form; (b) the psychological teaching gives pride of place to law consciousness, laying ever greater emphasis on the psychological aspects as it develops; (c) sociological jurisprudence concentrates chiefly on the process of law application, on the "social functioning" of law, which, as a rule, results in identification of law with its application and enforcement; (d) institutionalism in law identifies it with public normativism as a whole, thereby losing sight of the specific features of law, those distinguishing it from other kinds of public norms; and (e) the modern philosophy of law exaggerates the role of the ideal beginnings of law and, in equal measure, the import of its aims (juridical-axiological finalism). The list could be considerably extended.

From what has been said it follows that the dominant bourgeois legal theories have not been created out of nothing. They are something more than the visions of their authors; which is not to say that the bourgeois science of law is not without its constructions which are quite remote from the realities of the day and wander away into the area of pure speculation. However, shifting of emphasis and exaggeration are typical of these theories in their approach to the actual elements of the legal superstructure and the processes taking place in it. The overall effect is not simply distortion

of one or another element of the superstructure, but of the superstructure itself and of the law as a whole.

The bourgeois theory of law, all the way from the 19th century "classical positivism" to the present day, could well be depicted as the work of a researcher trying to systematise the various elements of the complex legal reality. Where he should have had the ability of the dialectician to comprehend this reality in the complex interdependence of all its elements, in the contradicting unity of necessity and freedom, of the causal and the ultimate, of reflection and social creativity, of structure and process, of continuity and discontinuity, this researcher, using the methods of formal logic, singles out first one and then another of these components.

The bourgeois science of law, by virtue of its social and political background and the logic of its contest with Marxism, has simply proved incapable of distinguishing the social regularities which alone make possible a dialectical approach to law as a unified, complicated social entity.

A certain part has been played here also by the so-called judicial thinking, which takes shape in the process of application of law and the elaboration and systematisation, again from the standpoint of formal logic, of existing law. Characteristic of this thinking is the practical tendency to make strict differentiations—once more from positions of formal logic—between the basic legal concepts, norms and institutions. Such ways of thinking, transferred from the field of practical application to the theoretical sphere, inevitably lead to problems being posed even at this level as if it were a matter of delimiting one legal institution from another, i.e., on the plane of formal logic. The result is that the general theoretical problems of jurisprudence, which should be solved by discovering their intricate dialectical connections and dependencies, emerge as logical antinomies constructed on the "either/or" principle and resolved according to the law of the excluded middle.

There is, for example, a close dependence between the causality of law and the aims which it pursues. However, if the problem is posed in the following terms: "Does law relate to the sphere of causality or to the sphere of the ul-

timate?", it will be seen that the actual posing of the question is the proof of a wrong approach.

It follows, then, that the complexity and multiformity of law and of the legal superstructure as a whole provide the objective grounds for the appearance of a diversity of legal theories; the method is metaphysical and non-dialectical, while specific-historical social conditions and, to a certain extent, the inner logic of scientific development, decide the choice of the different points of departure. Thus in the second half of the last century, when positivism appeared on the scene, there was an objective possibility (especially bearing in mind the English way of law-making via the courts) for exaggerating the importance of the process of applying the law. But this possibility was realised only in the twentieth century when the changing economic and political conditions rendered it necessary.

As a result of a fairly long process of evolution, the bourgeois theory of law in its attempt to resolve the problem of the essence of law found itself in what might be described as an "epistemological blind alley", for no matter how complex the law and the legal superstructure, their trends, aspects and distinctions are not endless and, in effect, all of them (with the exception obviously of those that run counter to social reality) have long served as the starting point for bourgeois teachings on law. All, or at any rate most of them, and in all possible variations, have been tried out over and over again.³¹

In this way the appearance of fundamentally new trends has been considerably hindered, and eclecticism, speculative constructions and searching for the "new in the old" have come into their own.

There is yet another vital epistemological factor without which it would be difficult to explain the appearance of a number of bourgeois law schools, namely, the relationship between bourgeois legal science and philosophy. It is not our purpose to go into the question of the overall influence exerted by philosophy on the theory of law, which is both

³¹ For details see Z. M. Chernilovsky, "A Reactionary Revision of the Ideological Heritage in Bourgeois Legal Science, Law and Practice", *Annals of the All-Union Corresponding Juridical Institute*, Vol. VI, 1966, p. 41 (in Russian).

considerable and logical. It should be noted, however, that the plurality of bourgeois law schools is attributable to the influence of bourgeois philosophy. What we have in mind is chiefly the fact that the philosophy of law, in the shape in which it was "regenerated" at the turn of the century, was characterised by a conscious searching for and borrowing of the modern concepts of idealist philosophy with a view to transplanting them to the soil of law. And since the dominant feature of 20th century idealist philosophy is pluralism of teachings and speculative systems, this, understandably, is reflected also in a pluralism of schools in the bourgeois philosophy of law.

Neo-Kantianism in its Marburg and Baden variations, neo-Hegelianism, Bergsonism and other varieties of the "philosophy of life", such as phenomenology, axiology, existentialism—in a word, practically all the known systems in modern Western philosophy are refracted in the bourgeois philosophy of law. And it is these, as a rule, that have fathered the new concepts and systems (for example, the phenomenological and existentialist schools of law, and others). Frequent efforts are also made to buttress existing legal concepts by means of new philosophical foundations.

True, in the long run, the dominant philosophy would have exerted its influence on jurisprudence even without the latter's search for the "new idealism", but only in the long run and in a general way. A result of this subjective striving for "philosophical salvation" is that many of the juridical-philosophic constructs tend to be artificial, having little to do with the inner logic of jurisprudence and its development, and were it not for the subjective strivings of their authors to link up, frequently without sufficient justification, the particular philosophical system with the problems of law, legal science could get along quite well without them.

These artificial transplants are frowned upon by some exponents of the bourgeois philosophy of law. Fechner, for example, finds that "a reading of the numerous books on the subject leaves one with the impression that the philosophy is too easily come by. Nothing is gained by the simple carrying over of ordinary philosophical ideas to the sphere of law. In the spiritual outlook of a particular nation,

unity should be not the starting point, but the result of effort. . . . It should be said at once that the philosophy of law is not just a simple carrying over and application of the general philosophical results in the particular sphere of law".³² Despite such commendable advice, Fechner's own concepts derive wholly from this very basis.

Certain concepts of law are not so much products of any development in legal thinking but rather the result of the application to law of theses derived from psychology, cybernetics and from other branches of science. Recall, for example, the Freudian thesis of "law as self-control", and "law as psychological self-analysis", which has been further elaborated not so much by jurists as by psychologists and psychiatrists—R. West, D. Goldstein and others.

The advance of cybernetics has produced jurimetrics, which involves not only the application of computer techniques in law, with all the necessary preliminary work involved, but also an attempt to answer the question—what exactly is law—in terms of the concepts of communication, management and information.

One of the first forays in this direction was made by Norbert Wiener, the founder of cybernetics, for whom law is a means of communicating, a process of regulating the combined reactions of various individual couplings.

When, however, we turn from the past to the present plurality of trends and schools, we no longer observe the deep-seated conflict that bedevilled their relations in the past; the relationship is reminiscent rather of a stable co-existence. Their real battle nowadays (both individually and collectively) is with Marxism.

One should not infer from what has been said above that the polemics have ceased altogether between the particular bourgeois trends and schools. For apart from anything else, the very existence of the trends and schools is in itself indicative of conflicting viewpoints which, not infrequently, break out into hotly contested debates. The overall tendency is, however, towards a weakening of the rivalries between the main trends and schools, towards relatively closer

³² E. Fechner, *Rechtsphilosophie*, S. 5.

relationships. And it is here that we encounter one of the typical features of modern bourgeois legal thinking.

For the rivalry between schools to have a really beneficial and scientific character, the basic requirement is that it should reflect the conflict between the old and the new. But it cannot be said that out of all the major trends in the bourgeois general theory of law, any one is, properly speaking, new. Normativism, sociological jurisprudence, the psychological trend, the revived natural law, institutionalism and other theories have decades of existence behind them. And while it would be true to say that fresh currents and concepts have made their appearance, and that the trends themselves have been modernised to keep up with the ever-changing scene, the fact remains that to this very day not one of them can claim any novelty in relation to the other. This, obviously, is a situation that is bound to affect the relationships between these trends, which had gradually learned to live together and tolerate one another, especially when confronted with the common danger of an increasingly influential Marxism.

In Western literature on the subject, the idea of a mutual "rehabilitation" of the schools is given prominence, with particular emphasis on the point that, far from being in opposition, they supplement one another, each in its particular field of research. Even the traditionally hostile concepts such as natural law and positivism are trying hard to find a common ground, and of this we shall have more to say later when we subject the trends to more detailed examination.

The friendlier relations between schools come out particularly in the similar solutions they offer to important problems with implications for present-day politics. Certainly all the basic trends come up with similar solutions to problems such as the relationship between state and law (primacy of law), law and the judiciary (judicial law and discretion). The arguments offered may vary, but conclusions and findings almost always coincide.

This tendency on the part of the major schools to close ranks is welcomed by many Western writers as an indication of bourgeois jurisprudence moving away from the "one-sidedness" of schools towards a higher stage—synthesis.

More and more jurists are coming round to the idea that all that is required of the different trends is to combine, re-examine and reassess their particular standpoints, an exercise which, so they aver, would simultaneously end the "one-sidedness" and produce a genuinely new and all-embracing theory.

One of the more consistent advocates of this idea is the American professor Jerome Hall, who way back in 1947 called for an "integrative jurisprudence". Since then Hall has pursued this idea in his writings.³³

As Hall sees it, the defect of contemporary jurisprudence is its "sophistical" separation of values, facts and legal norms. And so, turning to the natural-law doctrine in its revived aspect (with which he is most in sympathy), to "legal realism" and to positivism, Hall expressed the view that each one of these yields but a part of the truth. If, however, they made a combined approach, all their powers would be brought into play, their defects neutralised and the outcome would be a truly "integrative jurisprudence".

Hall, undoubtedly, is correct in drawing attention to the one-sidedness of the trends indicated. He is correct, too, in noting (as was noted long before him by others) both the "anti-conceptualism" of American realism and the "negativism" of the positivist and normativist schools in their treatment of ethical foundations in law. Nor is there anything to condemn in the recipe for his "integrative jurisprudence" which, in Hall's view, should include legal ontology, formal theory, sociology and exiology of law. The Marxist general theory of law also takes in a wide range of problems. But the point about Marxist legal theory is that it surveys all the problems from a single theoretical standpoint; the solutions to those problems are arrived at from a single philosophical and methodological base that links up the different aspects of the study of law.

As we see it, Hall errs when he lumps together approaches to law deriving from widely assorted theoretic and methodological foundations. How, for example, can one

³³ J. Hall, *Integrative Jurisprudence: Integrations of Modern Legal Philosophies*, New York, 1947; J. Hall, *Studies in Jurisprudence and Criminal Theory*, New York, 1958.

combine the Kelsen concept of law, based on the strict distinction between "is" and "ought", indifferent to the concrete behaviour of the parties involved, with the theory of legal realism, which in effect denies the importance of normative material?

Continuity and utilisation of results already achieved—in compressed form and on a new basis—are essential to the growth of any science. At the same time, in the history of science not a single genuinely scientific theory has come into existence merely by adding up questions previously posed and decisions reached, as suggested by integrative jurisprudence.

Chapter One
THE JURIDICAL WORLD OUTLOOK

1. THE DIFFERENT MEANINGS OF THE TERM
"LEGAL IDEOLOGY"

The term "legal ideology" has a variety of meanings. It may be seen, for example, as the particular ideology expressed in a given type of law or system of functioning law. Any law is an expression of definite ideas and, what is more, of a definite social outlook. In acting as the "mouth-piece" of ideology, law of necessity imparts to the ideas and ideological principles it expresses a legal aspect, even though the ideas and the principles may not necessarily have a legal content (for example, recognition in law of religious interests). Law is always calculated to have certain ideological effects (it is possible even to speak of the ideological function of law). These effects, while particularly true of the legislative practice of revolutionary times, are common to all systems of law, for all of them are heavily laden with ideology. Major legislative acts of the nature, say, of the Napoleonic Code, could well be described as ideological memorials to their times. The state Constitution has a highly significant ideological role to play.

Now let us take another meaning of the term—legal ideology as the reflection in social consciousness of such a

vital and complex component in the life of a state-organised society as the law; here it is a theoretical class consciousness which regards law as the very foundation of public life, which visualises the social milieu through the prism of legal notions in much the same way as the ideology of religion sees the social reality through the medium of religious notions. In this case, legal ideology is synonymous with what is known in Marxist legal theory as the juridical world outlook.

The concept of legal ideology is also used of any theoretical notions regarding law. In this sense, its horizons are more extensive, for it embraces not only those views on law which see law as the fundamental rule of social life (views, that is, proceeding from the juridical outlook) but also other possible views on law and on its role in the life of society, including negative views. When legal ideology is regarded as a world outlook, it differs in content from other ideologies (from religious ideology, for example). But in the second meaning of the term, the criteria for the distinction lie in the various forms of the social activity of people and of the corresponding social institutions (for example, people's views on law as distinct from their views on religion).

Another reason for dwelling on the two differing meanings attached to the concept of the legal ideology is that their confusion in Western literature on the subject is used for the purpose of attacking Marxism. In the early years of Soviet juridical science legal ideology came in for a severe battering on the grounds that it was the ideology of the bourgeoisie. Some of its critics urged that, since it was a specific product of capitalist society, it should be thrown overboard. One of the writers of those days put it like this: "...two qualities of legal ideology, its incompleteness in relation to the subject which forms its content, i.e., to the social relationships, and its lack of correspondence to the reality of these relations—it is this that impels us to the view that the ideas of the jurists have nothing whatever in common with the ideas of the scientists and theorists."¹

¹ V. Adoratsky, *Concerning the State. The Question of Method in Research*, Moscow, 1923, p. 13 (in Russian).

While not forgetting that this criticism bears the stamp of legal nihilism, and that it is not particularly exact in its terminology, it must be granted that its target was, in the main, the juridical outlook as the classical world outlook of the bourgeoisie. Many bourgeois writers seized on this critique as proof that Marxist thought had no room whatever for law or for studying the life of society in its juridical aspect.

In reality, the critique of legal ideology as a world outlook did not prevent Marxism from founding a theory of law and its relationship to other vital social phenomena—economics, the state, classes in society, politics, education and culture. Nor has Marxism ever denied the necessity for a juridical standpoint, for a juridical design for studying the social milieu. It criticised the juridical outlook not because it operated with legal postulates, but because the postulates had been exaggerated out of all proportion to the detriment of other approaches essential to an understanding of the mechanism of public life.

In bourgeois social thinking we shall find that the two meanings of the term “legal ideology” tend to overlap. Many bourgeois law theories, especially the early ones, were based on the juridical outlook and gave expression to its concepts. Others adopted different standpoints. In this chapter we shall dwell on the evolution of the juridical outlook and follow up with bourgeois legal ideology as a complex of theoretical postulates on the subject of law.

2. MARX AND ENGELS ON THE JURIDICAL WORLD OUTLOOK

The juridical world outlook may be defined as an historical phenomenon associated with the rise of capitalist society, a system of economic, political and other relationships based on the capitalist mode of production.

In his article “Juristen-Sozialismus” (“Juridical Socialism”), Engels referred to the juridical outlook as a landmark in man’s ideological development. Replacing the theological outlook of the Middle Ages, it became the classical bourgeois view. In time, however, with the onward march of society, it had to give way to another outlook, an outlook

corresponding to the conditions of life of the class of wage labourers and their struggles.²

In his brief but apt characterisation of the juridical world outlook, Engels noted: "This was the theological outlook which had acquired a secular character. The place of dogma and of divine law had been taken by the law of man, the place of the Church by the State. Economic and social relationships, which earlier, having had the sanction of the church and regarded as creations of the church and dogma, were now seen as being founded on law and created by the state. Since commodity exchange on the scale of society and in its more developed form . . . necessitates complex contractual relations, the generally acceptable rules established by society as a whole—legal norms sanctioned by the state—the idea took shape that these laws originated not in the economic facts but were formally established by the state and introduced by it. And since competition—the basic form of the contacts between free commodity producers—is the great equaliser, equality before the law became the grand rallying cry of the bourgeoisie. The fact that the struggle waged by this new, rising class against the feudal overlords and the absolute monarchy, which came to the fore at the time, could not but be, as with any class struggle, a political struggle, a struggle for state power and for legal demands—this fact helped in consolidating the juridical world outlook."³ Thus it was that the juridical world outlook was summoned to life by two fundamental factors—the socio-economic factor of the growth of commodity capitalist relations and the political factor of the need for state and legal sanctions and safeguards for the new economic and political relationships. "Juridical world outlook" is by no means an accidental formula, thrown up in polemics with those who sought to interpret socialism in the spirit of the bourgeois-reformist philosophy of law. Although the concept was formulated rather late (the "Juridical Socialism" article appeared in 1887), the idea that the rise of the capitalist system brought to the fore legal-ideological forms of thinking in relation to the social reality permeates all the writings of the founders of Marxism.

² Marx/Engels, *Werke*, Bd. 21, Berlin, S. 492-94.

³ *Ibid.*, S. 492-93.

Marx pointed out that in capitalist society, in contrast to feudalism, legal forms predominate.⁴ *The German Ideology* traces many of the factors which led to the conclusion that "...political and civil history becomes merged in a history of the rule of successive laws".⁵ In later works, Marx returned again and again to his critique of that juridical thinking which saw in the law the base of society, and not society as the base of law, and which, because of the legal tangle of socio-economic relations, failed to appreciate their true content.⁶ Marx gave numerous examples of how political and legal forms are conditioned by material, economic factors, thus polemicising with the widespread juridical outlook notions of his day.

Even in the period before he wrote "Juridical Socialism", Engels expounded various aspects of the propositions he was later to formulate and summarise in his article. In *Anti-Dühring*, for instance, Engels cited the example of the historical development of the principle of equality to demonstrate the changes in ideological thinking.⁷ Elsewhere he wrote, "once the state has become an independent power *vis-à-vis* society, it produces forthwith a further ideology".⁸ He follows up the phrase just cited with this: "It is indeed among professional politicians, theorists of public law and jurists of private law that the connection with economic facts gets lost for fair. Since in each particular case the economic facts must assume the form of juristic motives in order to receive legal sanction; and since, in so doing, consideration of course has to be given to the whole legal system already in operation, the juristic form is, in consequence, made everything and the economic content nothing."⁹

From the context it is clear that by the new ideology, engendered by the greater independence of the state in bourgeois society, Engels had in mind precisely legal ideol-

⁴ K. Marx, *Theories of Surplus-Value*, Moscow, 1969, p. 368.

⁵ K. Marx and F. Engels, *The German Ideology*, Moscow, 1969, p. 359.

⁶ K. Marx, *Theories of Surplus-Value*, pp. 302-03.

⁷ F. Engels, *Anti-Dühring*, Moscow, 1969, pp. 127-28.

⁸ K. Marx and F. Engels, *Selected Works* (in three volumes), Vol. 3, Moscow, 1970, p. 371.

⁹ *Ibid.*

ogy—the juridical outlook, which sees in law and in the state the main motive force of the social relationships, and the centre of gravity of the state—in the state alone.¹⁰

Likewise Engels's critique of the theory of force, to which he returned again and again, is, in effect, a critique of notions based on the juridical world outlook. Lenin, in his polemics with the Narodniks (who were greatly influenced by notions of this nature), recalled Engels's point in *Anti-Dühring* about the "force theory", according to which the political-juridical system precedes the economic, and which was eagerly seized upon by writers in *Russkoye Bogatstvo*.¹¹ Again and again, Lenin returned to the juridical outlook fetishism, which worshipped the legalised form of the social relationships, concealed their real socio-economic substance and, above all, the social inequalities of the capitalist system.¹²

The manner in which Engels characterised the juridical outlook as the "classical world outlook of the bourgeoisie" should not be taken as applying to all the possible manifestations and forms of the bourgeois ideology of those days. Time and again, he spoke against the absolutisation of concepts and, in emphasising the importance of being able to think in terms of trends, undoubtedly wished to single out the mainstream in the ideological atmosphere of established bourgeois society, to emphasise the basic trend of its ideology. This is not to imply, however, that in the ideological life of the bourgeois society of those days there were not other trends, trends that were different from the "classical" model. The juridical outlook itself was set forth in different ways and indeed found expression in a whole variety of doctrines.

In its early phase, the Soviet science of law was not without experts who found much to criticise in the juridical outlook. "Bearing in mind Engels's view that 'the juridical outlook is the classical world outlook of the bourgeoisie', we declare war on this juridical or bourgeois outlook. This

¹⁰ Young Marx wrote this "centre of gravity of the state" ("*das Gravitationsgesetz des Staats*") in his "Der leitende Artikel" in Nr. 179 der *Kölnische Zeitung* (see Marx/Engels, *Werke*, Bd. 1, 1956, S. 103).

¹¹ V. I. Lenin, *Collected Works*, Vol. 1, p. 149.

¹² *Ibid.*, Vol. 20, pp. 189, 200.

does not mean, however, that we reject law in general, as an instrument of the class struggle in the hands of the proletariat."¹³

In recent years the juridical world outlook has been all but forgotten in Soviet writing on general theory of state and law and in the history of political doctrines and in philosophical literature, including works directly touching on social consciousness and its forms. Possibly the lapse is due, in some measure at least, to the absence of any answer to the question: Is it possible nowadays, in the new historical setting, to speak of the juridical outlook as the "classical world outlook of the bourgeoisie"?

Let us turn, then, to the basic features of this outlook and its evolution, bearing in mind that the subject is vital to an understanding of the rise of the bourgeois political-legal ideology and its present state.

3. SPECIFIC FEATURES OF THE JURIDICAL WORLD OUTLOOK

The actual content of this outlook reveals certain fundamental features.

The first is the view on law as the fundamental principle of public life. It is not society, not its requirements and interests, deriving from the given mode of production and the production relationships, that give rise to justice and law; on the contrary, justice and law give rise to society.

The belief that law plays the leading role in the life of society and that all social problems can be solved with its aid found its clearest expression in the doctrine of natural law and in the Enlightenment and, in particular, in its political demand—replace the rule of people by the rule of law. Invoking the favourite Enlightenment thesis concerning the omnipotence of the law, Helvétius proclaimed: "The laws can do everything." Diderot attributed the origins of society to the labours of the law-maker, while Holbach held that the only thing needed for social progress was the hand

¹³ Collection *Revolutsiya prava* (Revolution in Law) No. 1, 1925, Foreword.

of the humanist-legislator. The men of the Enlightenment believed that laws in general, that is, essential relationships, deriving from the very nature of things, and juristic laws, while not identical, are of a kinship close enough to identify them as of a like nature.¹⁴ This was one reason for the illusion that law was omnipotent.

Cambacérès, submitting his Civil Code to the Convention in 1794, referred to it as "the Code of nature, sanctioned by reason and guaranteed by liberty. . .".¹⁵

This definition did not fall out of the blue. The previous development of bourgeois socio-political thinking had brought to the fore the doctrine of natural law, which tended to interpret law chiefly as a natural phenomenon, predetermined by man's nature, not as the result of systems of social relationships; these, it was argued, had to be reconstructed and brought in harmony with man's nature. Here again the stress was on the constructive and transforming role of law and stimulated the emergence of the juridical world outlook. The strivings of the natural-law theory to combine the concepts of law and reason go back to the earlier interpretation of law—written law on the Continent and especially common law in Britain—as the expression of reason (*ratio scripta* or written reason), the guiding principle of human life.

Yet another source of the illusion that law is the well-spring of society relates to commodity production, or to be more precise, the legal forms of simple commodity production (historically, Roman private law) which proved to be not merely useful but even essential to the relationships of the capitalist mode of production. The formation of these relationships in feudal society and the consistent acceptance of Roman law took place as two interlocking processes. "Roman law was the consummate law of *simple*, i.e., precapitalist, *commodity production* which, however, included most of the legal relations of the capitalist period. Hence, it was precisely what our city burghers *needed* at the time of their

¹⁴ See, for example, Charles Montesquieu, *L'esprit des lois*, *Œuvres Complètes*, Vol. 1, Paris, 1820, p. 1.

¹⁵ Quoted from W. Seagle, *The Quest for Law*, New York, 1941, p. 284.

rise and what they did *not* find in the local law of custom."¹⁶ While the bourgeois codification of private law in the 19th century obviously included numerous non-Roman elements, the fact remains that, basically, it arose from the prescriptions of Roman law. The legal forms of simple commodity production survived the replacement of the older social formations by the new, the rise and fall of various state formations and forms of government. This, naturally, gave rise to the notion that law was one of the most solid foundations of society. We may add that it supplied, and to this day supplies, bourgeois legal science with a pretext for denying the intrinsic link between law and state.

The era of industrial capitalism was accompanied, as we know, by a remarkable growth of law (codification on the continent, and, in Britain, reform of the common law and its fusing with equity). Constitutional law acquired greater significance and the sphere of law was widened, embracing the sphere of state power and administration. This was the time of a truly remarkable advance by law in shaping the new relationships both in the economy and in political life. The outcome, understandably, was a greatly increased respect for law as the architect, so to speak, of the new social relationships. Keeping track of the reciprocal effect of legislation on social relationships presented fewer difficulties than to follow the process of formation of the new bourgeois-type law and its dependence on production and other social relationships.

One other factor, this time political, added to the lustre surrounding law as the basis of society. The point is that this young bourgeoisie quickly realised that of all things law could, on the one hand, be the sure guarantee and safeguard of unhindered expansion on the part of free enterprise and, on the other, and equally important, act as protector against the likelihood of encroachment by any of its rivals, including the state authority (the bourgeoisie had suffered enough from the arbitrary actions of the feudal barons and at the hands of the absolute monarch). The juridical outlook is indeed closely associated and interlinked

¹⁶ K. Marx and F. Engels, *Selected Correspondence*, Moscow, 1955, pp. 451-52.

with the "laissez-faire" watchword of industrial capitalism. The Western writer Leclerque, who coined the term "juridisme" as a kind of shorthand for the juridical outlook, aptly characterised economic liberalism as the political expression of juridisme.¹⁷

Liberalism totally rejected the idea of any state intervention in the economy. Law, however, being regarded as the "rules of the game" essential to the functioning of the capitalist commodity economy, was a different matter. Private ownership and free enterprise had all the appearance of being founded on law and, simultaneously, of being independent of the state (the "night watchman"), which merely had the function of protecting them. This brings us to yet another conceptual expression of the juridical outlook, or a concept which was originally closely associated with it, namely, the theory of the *Rechtsstaat*.

This politico-juridical concept was a convenient way of translating the principle of laissez-faire into legal language. According to R. von Mohl, "The *Rechtsstaat* cannot pursue ends other than those of establishing a system of nations living together, with each member of the community enjoying maximum freedom for all-round application of his energies and their realisation (read: "free enterprise"—*U.T.*).... Freedom of the citizen in this context is the loftiest principle of the *Rechtsstaat*."¹⁸ Clearly, in the given case the *Rechtsstaat* is simply a synonym for state policy based on "laissez-faire".¹⁹

But where was the guarantee that a policy of this nature would be carried out, especially in those countries where at the helm of state were the men of the old nobility and, behind them, the monarchy? The demand that the state should be bound by law was brought forward because the

¹⁷ J. Leclerque, *Du droit naturel à la sociologie*, Vol. 2, Paris, 1960, p. 113. As defined by this writer, *juridisme* is the view that, given good laws, all will be well in the world (p. 110).

¹⁸ R. von Mohl, *Die Polizeiwissenschaften nach den Grundsätzen des Rechtsstaates*, Bd. 1, 1844, S. 8—quoted from Meister: *Das Rechtsstaates Problem in der Westdeutschen Gegenwart*, Berlin, 1966, S. 29.

¹⁹ W. Seagle, referring to the English equivalent of the *Rechtsstaat* concept, as the "rule of law", writes: "It has been discovered by experience that the rule of law is only one of the myriad disguises of economic laissez-faire" (Seagle, *op. cit.*, p. 227).

concept of law was the very embodiment of the new social relations. Primacy of law over the state, subordinating the latter to law (even in Jellinek's rather mild thesis of the "self-restricting state") was in line with the spirit of liberalism and the juridical outlook.

This outlook has one rather significant consequence. Since law is regarded as the bedrock of society, law is treated as something preordained, without any attempt to understand its social causes. Law acts in rather the same way as religious dogma, which was similarly accepted by the earlier theological world outlook as the basic postulate requiring no substantiation. It is as such a postulate that law is depicted by the adherents of positivism. Later, neo-Kantianism simply regarded law as an *a priori* category, which explained reality instead of being explained by reality.

Another specific feature of the juridical outlook is its reduction of the real economic and political relationships chiefly—and, frequently, solely—to their legal forms. Rarely getting beyond the juridical outer casing of highly complex social relationships, it claims to have reached their centre of gravity. The juridical outlook is an outstanding example of failure to understand the rule that the essence of social processes rarely coincides with the forms in which they appear.

In the writings of Marx and Engels numerous examples adduced from the sphere of economic relationships (buying and selling, rent, etc.) show how necessary it is, although often extremely difficult, to distinguish the legal form of the relationships from their economic content. This close interconnection largely explains the epistemological roots of the juridical outlook as a fetishisation of the law. This legal fetishism is most clearly demonstrated at those moments when capitalism has really come into its own, when the new legal systems have been established and the large-scale codification of law has been accomplished. Its conceptual, theoretic expression assumes the shape of juridical positivism, which restricts the functions of legal science to a merely formal-dogmatic documentation of the functioning law and elaboration of strictly juridical formulae.²⁰

²⁰ The natural-law doctrine underlines the basic feature of the juridical outlook—law as the foundation of public life. This doctrine and

"Only bourgeois-capitalist society creates all the necessary conditions enabling the juridical element in social relationships to stand out clearly and distinctly,"²¹ wrote the Soviet jurist Pašukanis. But, the development of this juridical element gives rise in turn to the belief that to it alone belongs the role of main determinant in the social relationships. "Just as the wealth of capitalist society assumes the form of a vast mass of commodities, society itself takes on the appearance of an endless chain of legal relationships."²² And once the legal form (the "juridical element") becomes the basis of evaluation of the social, it masks the fundamental contradictions of capitalist society; freedom of contract masks the actual inequality between worker and employer, while the formal equality of all before the law, etc., masks the privileges of wealth.

An example will show how the legal trappings can conceal the kernel of the socio-economic relations. Take the law-governing private ownership. The legal right needed by the capitalist in order to exercise the right of capitalist ownership coincides with the right needed by the ordinary commodity owner to appropriate the product of his own labour. In the conditions of commodity production and private ownership of the means of production, the alienation of the commodity necessitates identical, juridically recognised rights for all commodity owners, whether small producer or large-scale capitalist, the rights of ownership, use and disposal, the existence of which enables the property owner to exercise his power over the commodity in its "natural form".

It follows, then, that the right to regulate ownership acquires, to one degree or another, abstract features expressive of the general conditions of commodity production throughout the long period of its development. "These same rights remain in force both at the outset, when the product belongs to its producer, who, exchanging equivalent for equivalent, can enrich himself only by his own labour, and also in the

positivism bear much the same relation to each other as the classical and vulgar schools in bourgeois political economy.

²¹ E. B. Pašukanis, *General Theory of Law and Marxism*, Moscow, 1925, p. 19 (in Russian).

²² *Ibid.*, p. 41.

period of capitalism, when social wealth becomes to an ever-increasing degree the property of those who are in a position to appropriate continually and ever afresh the unpaid labour of others."²³

If, then, we stop at the right to own property as the general expression of ownership, use and disposal, the real social inequality, the qualitative socio-economic distinction between the capitalistic private ownership of the instruments and means of production and the ownership by the worker of articles of consumption is obliterated and the quintessence of capitalist private ownership—the right to appropriate the unpaid labour of others—is not seen at all. This typical way of thinking, deriving from the juridical approach, is elevated to the status of a methodological principle.

Another example of how the realities of life are seen through the prism of the juridical outlook, is to be found (we now turn from economics to political institutions) in the view on the state held by the so-called juridical school. Spokesmen of this school, when attempting a definition of the state, take as their starting point the legal categories and concepts elaborated in the course of positivist studies of functioning law (the state as a law relationship, the state as a corporation, etc.). Law is regarded as the foundation, the necessary precondition for the state. "There is no need whatever," wrote Stammler, "for juridical norms to be established by the organised force which we know as the state", but "the concept of the state cannot be established without the premise of law. The latter is the logical prius. It is possible to define the legal system without any reference to the state bodies, but one cannot speak about the state authority without the presumption of juridical norms."²⁴

G. Kohen, leader of the Marburg school, claimed in his *System der Philosophie* (System of Philosophy) that the methodology of any theory of the state is founded in juridical science, and the theory itself can never be anything

²³ K. Marx, *Capital*, Vol. I, p. 587.

²⁴ R. Stammler, *Wirtschaft und Recht nach materialistischen Gesichtsauffassung*, Leipzig, 1896, S. 125, 126.

else but a theory of state law. Attitudes of this nature were typical not only of neo-Kantianism. They expressed the more general ideological thinking of the bourgeoisie, thinking engendered by the juridical outlook and by liberalism with its concept of the state as the "night-watchman", or *Rechtsstaat*. Time was needed before bourgeois ideology granted recognition to the "independence" of the state as a target for political science and the sociology of the state.

In the 1930s, Pašukanis wrote: "Bourgeois teaching on the state is ninety per cent juridical teaching on the state."²⁵ Even then, this was an exaggerated statement. Nevertheless, it correctly reflected the fact that over a long period of time the bourgeois theory of the state had developed chiefly in the terms and concepts of jurisprudence.

In Marxist theory the interdependence of state and law is generally recognised, and the point is expressed unmistakably even in the name given to the basic juridical discipline—"the theory of state and law". But bourgeois jurisprudence both historically and logically, in view of its juridical outlook traditions, figures at best as a "theory of law and state". What we get, then, is a rare exception to the general rule that although a replacing of its parts takes place, the whole remains without change.

The separation of the legal form from the socio-economic and socio-political content, as expressed in the formal equality before the law and the factual inequality, contractual freedom and the economic inequality of the partners in the contract, and so on, have for long been used to mask the exploitive nature of the capitalist relationship and the omnipotence of capital in the economy and in politics. For this reason the critique of the juridical outlook and legal fetishism has always been regarded by the revolutionary working-class movement as essential to unmasking the real nature of the capitalist system.

Another feature of the juridical outlook is its tendency to regard bourgeois law as an absolute. The juridical outlook stressed the role of law in society, and in this sense

²⁵ *Teaching on the State and Law*, ed. by E. Pašukanis, 1932, p. 26 (in Russian).

it was positive. At the same time, however, it tacitly identified law in general with bourgeois law; the development of law is acknowledged only until the arrival on the scene of bourgeois law, beyond that, no. On this reckoning it follows that the "base of society" is metaphysical and immovable.

In its earlier phase when it first took shape as the herald of the natural-law doctrine, the juridical outlook called for social change, for the reconstruction of society in keeping with reason and law, but later, with the triumphant rise of the bourgeoisie, its whole purpose took an about-turn: society, now having acquired a perfect legal foundation, had no reason for throwing it overboard. Hence the juridical outlook became as negative as could be to the mere thought of any radical social change. Engels, commenting on this change in the attitude of the classes contending for power and achieving it, wrote: "At an *earlier* stage the right to revolution existed, otherwise those in power would be denied the sanction of law, but as time went on this right was abolished."²⁶

In line with the general tendency of the dominant classes of exploiters to depict their various institutions, interests and ideas as those of humanity generally and of society as a whole, to give them out as universal, the juridical outlook and the bourgeois jurisprudence based upon it with its smug apologia for the capitalist legal system interpreted bourgeois law as the finished and perfect model of law evolved throughout the development of society.

It will be appreciated that in the last century, against the background of an enslaved colonial world with its underdeveloped semi-feudal countries, it was not difficult to gain support for ideas of this nature. For in those days bourgeois law could, with justification, claim to be the most perfect of all systems. The error lay in the claims of the bourgeois ideologists that history had at this point come to a full stop. As history went on its way, however, the old bourgeois juridical outlook became increasingly discredited. It became the synonym for a hardened conservatism or, at best, for a pale reformism ready to acknowledge social change solely in the

²⁶ Marx/Engels, *Werke*, Bd. 36, 1967, S. 238.

shape of partial legal reform well within the confines of the existing system.

With the victory of the October Revolution in Russia and the inauguration of the new socialist-type law, ideas culled from the juridical outlook began to be used against the socialist state. These ideas are used to justify the notorious thesis alleging the incompatibility of law and socialism; they proceed from the idea that anything differing from the "classical" bourgeois model cannot possibly qualify for the title of law. In 1954, summing up the experience of a quarter of a century in this particular field, the French comparatist René David made the point that the question of whether Soviet law could be said to exist had got Western jurists into difficulties and many of them were adamantly negative in their attitude. David offers this explanation for the negativism: "It is difficult to separate our ideas concerning law from those legal forms that prevail in our midst, and when faced with another concept, it is always possible to ask: does the point in the given instance concern law or not? Questions of this nature arise, for example, over Muslim law. . . . They also arise, undoubtedly, in connection with Soviet law. It is obvious that a law, which does not want to be bound by any absolute values, a law which, is believed, indeed hoped, will disappear, must be something different from what we in the West understand by law. Consequently, there are grounds for querying whether it can be qualified as 'law'. In the case of Muslim or Hindu . . . law, we are ready to agree that it may, possibly, differ somewhat from ours. In the matter of Soviet law, however, we are less tolerant, for here we have to do with a system of law which has no association with the Western system and expresses a heretical teaching replete with threats against us. When we refuse to see in this law, 'law', we are not merely saying that operating in the Soviet Union are concepts and principles which we regard as alien. We are also condemning these concepts and principles. . . ."²⁷

As we see, Western law experts are obliged to admit that a feature of their science is an "absolutisation" of bourgeois institutions and a hostile intolerance of socialism.

²⁷ R. David, J. Hazard, *Le droit Soviétique*, Vol. 1, Paris, 1954, p. 180.

In passing, it may be added that this habit of seeing things as absolutes also forms the basis of the new and currently fashionable convergence theory in its application to state and law. Whereas the economic variant of convergence, or the synthesis of the two social systems, places the stress on recognition by capitalism of some of the features of socialism, its political-legal variant prefers to accent the recognition by socialism of some aspects of bourgeois democracy. This envisages the development of socialist law. It is acknowledged as "real law" only to the extent that the ideologues of convergence judge it to have approached the Western law model. Moreover, some of the general features common to the legal regulating of every civilised community, or of any form of commodity production and exchange are presented as specific features of this model. The institutions of socialist law are, in the main, considered from the standpoint of legal form, not from that of their socio-economic and political content and purpose.

Juridical studies and the juridical method in the social sciences, while not a specific feature of the outlook itself, are obviously associated with it to quite a considerable degree. At the beginning of this century, L. Petrazycki wrote: "At present, in the sphere of the new European studies, jurisprudence occupies a special and even exceptional place, as an astonishingly overgrown branch of knowledge compared with the elaboration of science in general and the science of morality in particular. . . . As an historical phenomenon . . . this flourishing of specialised science and the scientific profession on the soil of law is a characteristic phenomenon demanding an explanation in terms of the specific nature of law."²⁸

The explanation which Petrazycki demanded is to be found in the everyday requirements of the capitalist mode of production and exchange, in the historical circumstances of the rise of capitalism, circumstances which favoured popularisation of legal education among the bourgeois class. The same reasons retain their validity to this day. The prestige of legal science derived also from the special role which the

²⁸ L. Petrazycki, *The Theory of Law and State and Its Connection with the Theory of Morality*, Vol. 1, St. Petersburg, 1907, p. 214 (in Russian).

juridical world outlook allocated to law. To Kant's observation that in natural science there is as much science as there is mathematics, the neo-Kantian G. Kohen added that in the social disciplines there is as much science as there is jurisprudence. However, the jurisprudence of subsequent years never evoked such a degree of reverence.

Even in those days legal science was sometimes accused of being conservative and behind the times. "We cannot conceal from ourselves," wrote A. Menger, "that the science of law is the most backward of all disciplines and that the new trends reach it last of all as if it were located in a remote provincial town which hears the latest news long after it has been forgotten in the capital."²⁹ These charges were not without foundation, and the stagnation and backwardness were rooted in the same juridical fetishism.

Legal form nearly always lags behind social and economic development. This is largely due to the inevitable lagging of the social consciousness behind the social being. A certain time elapses before the new phenomena in the social, and especially the economic, spheres penetrate the minds and the will of the ruling classes, with a consequent delay in their finding legal expression and consolidation. In practice the gap is narrowed somewhat, in the early phases at any rate, by bringing these new phenomena into line with the existing legal forms, a process facilitated by the abstract nature of the norms in the more developed systems of law. In view of all these factors, the approach to the dynamic social life wholly or mainly through the legal forms, especially when they are canonised and regarded as the peak of legal development, provides objective grounds for the appearance of conservative trends in jurisprudence; to this could be added also some factors of a subjective nature, operating in the same direction.

No matter how contradictory the thesis concerning the special significance and standing of jurisprudence (Petrazycki and Kohen) and that of its tendency towards conservatism (Menger) seem to be, the one does not exclude the other. What is more, the fact of a particular trend advancing to

²⁹ A. Menger, *Das bürgerliche Recht und die besitzlosen Volksklassen*, Tübingen, 1908, S. 30.

the fore is often the cause of its turning towards conservatism.

The evolution of bourgeois social science in the present century has been largely in the name of its "delegalisation". Many social institutions and relationships have ceased to be the sole or almost the sole monopoly of jurisprudence. Typical in this respect is the branch known as political science.³⁰

In the past, when the juridical outlook towered above all the other teachings and trends, bourgeois legal thinking greatly influenced the other social sciences. Now, however, bourgeois juridical thinking, to a far greater degree than at any time in the past, is influenced by the social sciences. Still, it would be sheer exaggeration to affirm that bourgeois jurisprudence has fallen from its position of "leader" to that of "led". "For a long time research in the social sciences has suffered, in France at any rate, from the domination of the juridical standpoint. It is to be feared that somehow juridical science in its turn might suffer as a result of its rapid penetration of political science," a French author wrote in the 1950s.³¹ Time, however, has shown these fears to have been groundless. As hitherto, the science of law remains one of the more significant branches of bourgeois social doctrine, in much the same way as legal ideology still occupies a leading place in the general ideological arsenal of capitalism.

4. THE STAMMLER "REFUTATION" OF MARXISM

In its combat with Marxism, bourgeois legal science has leaned heavily on the juridical outlook. The primacy-of-law concept was invoked as a counter to the Marxist "economic" explanation of history. In this context a special place belongs to the ideas set forth by Stammler in his *Wirtschaft und Recht nach der materialistischen Geschichtsauffassung* (*Economics and Law from the Standpoint of the Materialist Conception of History*). Stammler frankly declared his intention

³⁰ "Jurisprudence has always been regarded as being of a political nature, but it would be wrong to describe it as a political science," writes the German jurist A. Baumgarten (*Staat und Recht* No. 10, 1957, S. 969).

³¹ *Revue française de science politique* No. 3, 1956, p. 634.

of entering the lists against Marxism. "There are but two ways in which to combat modern socialism. . . . It is possible to show that, in particulars, the natural process of economic life in our time is not that of the Marxist affirmation. . . . Or it is possible to question and critically to analyse the materialist conception of history as the foundation of social philosophy. The latter, undoubtedly, is the only reliable way."³² Stämmeler insists again and again that the need is to refute the basis of Marxism, to concentrate the attack on the thesis concerning the primacy of the socio-economic factor in the life of society. "Having resolved to combat the materialist conception of history, the opposition suffers not so much from want of supporters as from the consequences of the hitherto incorrect argumentation and from the dissatisfaction caused by an insufficiently thought-out plan of action. Instead of boldly confronting the enemy and tackling the problem as a whole, they preferred the hand-to-hand action which, while causing a lot of trouble, does little to decide the ultimate outcome."³³

To the Marxist thesis of law being conditioned by the economic base, Stämmeler replied with a thesis of his own: law is the prime category, constituting and shaping the economic structure of society.

Characteristically, this theoretic-ideological debate centred around the relationship between law and economics, that is, it concerned the same problem which the earlier positivism had wholly excluded from the field of vision of juridical science. Marxism had forced bourgeois jurisprudence to re-examine its views on matters where its scientific position was especially vulnerable. Generally speaking, the existence of an opposing world outlook is one of the vital contributory factors to the growth of ideology.

According to M. Reisner, a prominent Soviet jurist, writing on the subject of bourgeois jurisprudence, "the relationship between law and economics was one of the most hotly debated subjects in pre-revolutionary days in Russia". And the debate, as Reisner pointed out, was a bourgeois response to the "influence exerted by Marxist economic theory".³⁴

³² Stämmeler, *op. cit.*, Leipzig, 1896, S. 68.

³³ *Ibid.*, p. 69.

³⁴ M. A. Reisner, *Pravo. Nashe pravo. Chuzhoye pravo. Obshcheye*

For Stammler social life in all its manifestations is, in the first place, outwardly regulated community life. This "external regulation" or "external norm" is the precondition for social life, "the element in man's social life which makes it an independent phenomenon".³⁵ With the centre of gravity switched to the external regulation it follows that "the logic of social life is the logic of its juridical form".³⁶

The next stage in Stammler's reasoning is to transpose this general construct of "social life" to the "social economy". He defines the latter as joint activity for the satisfaction of human needs (with the hasty proviso that "the concept of joint activity is not to be confused with that of collective or communist activity"). The "social economy" depends on the factor of regulation and is conditioned by it. This regulating factor is law. "Law may be recognised as the final court of appeal bearing responsibility for the social economy because as the regulative form of social life it constitutes the determining base of all possible social phenomena."³⁷

In a sense, Stammler is right in saying that in everyday life the economic and juridical are closely interwoven. But the point is exaggerated by his extending it to the overall relationship between economics and law and by equating the juridical relationship with law as such. His point concerning the unity of legal regulation and the social economy enabled him to say that, in the given instance, the causal factor did not apply; for if the relationship of the "leading element"—legal regulation—to social life cannot be described as a causal influence, then even more emphatically the economic, in the Stammler context, cannot have any causal influence on law. Hence, Stammler concludes, the economic cannot break through the legal integument, as claimed by Marxism.

In practice, this approach (as with all the neo-Kantian revisions of Marxism) turns out to be yet another justification for a moderate reformism. According to this view any changes

pravo, Leningrad-Moscow, 1925, p. 12 (in Russian). One of the leading bourgeois journals specialising in the general theory of law appeared for a long time under the title: *Archiv für Rechts- und Wirtschaftsphilosophie*. Now *Archiv für Rechts- und Sozialphilosophie—ARSP*).

³⁵ R. Stammler, *op. cit.*, S. 111.

³⁶ *Ibid.*, S. 188.

³⁷ *Ibid.*, S. 312.

in society are determined by laws, and the criteria of these changes are supplied once more not by the social base, but by "natural law with its constantly changing content". How is it, then, that law, in the Stammler scheme of things, turns out to be the "final court of appeal bearing responsibility for the social economy"? Where, and what, are the factors paving the way to, and engendering, law? Stammler's response to this question is the purest neo-Kantianism; his starting point is not the history of society and of law, but human thought. Thinking evolves the signs, the indicators which, when applied to reality, enable us to arrive at the concept of "law". This concept itself, in keeping with the requirements of neo-Kantianism, must be characterised solely by indicators which are independent of the specific experience and distinctions of social life. In other words, the concept of law appears as an *a priori*, notional premise, engendered by reason for the purpose of cognising reality. "Particular observations on the law depend on the general concepts of law, not the other way round. Moreover the concept of law is totally independent of any social application of it in the sphere of actual experience," writes Stammler.³⁸

When any more or less developed science turns to particular subjects, relationships and phenomena it does so naturally on the basis of its established concepts. When discussing the legal nature of any particular social phenomenon or institution, we usually ask ourselves—does this come under the general concept of law evolved by science and practice? But this is only one of the stages of cognition, and the defect of the Stammler approach is that he, as a neo-Kantian, regards this stage as a kind of absolute, as the entire complicated socio-historical process of cognition.³⁹ There are other no less important stages in this process. For example, the question of how the general concept of law emerges from socio-historical practice, based precisely on "particular observations". How is it that in the process of the application of this concept in the "sphere of actual experience", it undergoes the inevitable

³⁸ R. Stammler, *op cit.*, S. 12.

³⁹ In the process of development, many material factors may drop out, but the concepts derived from them are retained in the memory, and passed on to the succeeding generations, thereby evolving the illusion of the independent existence of *a priori* concepts.

change induced by evolution in the socio-economic structure of society and by the action of the class forces, etc.?

The German researcher Werner Sellnow (GDR) states emphatically that "one cannot agree with the Stammler view of law as an absolute. The opposite is true. Each generation and each new political structure, operating with the received concepts [from the preceding generations—*U.T.*] should develop them in keeping with the material and political factors, rather than subordinate these factors to the outgoing concept. In this sense, any concept contains merely a relative truth; the concept should not become God, nor God a concept."⁴⁰

Stammler did not bother very much about subjecting his construct to concrete historical analysis. For him the vital thing was proof of the "logical primacy of law". As for history, obviously it would simply have to adapt itself to the "logical primacy". And yet, as history went on its way, social practice delivered a shattering blow to the Stammler thesis. At the turn of the century, the change from industrial to monopoly capitalism necessitated substantial modifications in the sphere of law. Practice demonstrated in the most striking fashion that in bourgeois society the economic processes rend asunder the legal forms when these become road-blocks. Hence the short-lived ascendancy of Stammler's thesis. And what is more, bourgeois theoretical-legal thinking as a whole lost interest in trying to resolve the problem of the relationship between the economy and law.⁴¹

After Stammler there appeared the rather more restrained concept, originated by Max Weber, which regards the economy and the law as mutually-conditioning factors. In the highly complicated fabric of social life these act in relation to one another now as causes and now as results. Some supporters of this view even claim for it that, on the one hand, it overcomes the extremes of Marxism and, on the other, the

⁴⁰ W. Sellnow, *Gesellschaft—Staat—Recht. Zur Kritik der bürgerlichen Ideologien über die Entstehung von Gesellschaft*, Berlin, 1963, S. 478.

⁴¹ It is symptomatic that Stammler himself (he died in 1938) never returned to the subject. Western writers on the subject of law, currently lauding his role in establishing the neo-Kantian philosophy of law, usually ignore his attempted "refutation" of Marxism.

Stammler primacy-of-law concept.⁴² This "overcoming of extremes", however, is nothing more than a figment, for the Marxist teaching, far from denying, actually stresses the not inconsiderable influence exerted by law both on the economy as a whole and on individual economic processes. Law can act as cause (given the existence of the economic preconditions) of the processes, and especially so when the role of the state in the functioning of the economy increases. It is another matter that the genesis of law as such is conditioned by the economic base of society, by its base relationships.

The reservation should be made, however, that, in the compromise scheme of the reciprocating influence of law and the economy, the economy is regarded as playing a minor role. Its influence on the law is likened to that of the moral, religious and other factors; it is never regarded as a factor determining the genesis and development of law. It is important to stress this. In those cases when, confronted with the actual realities of life, bourgeois legal theorists acknowledge the dependence of law on the economy, the admission is far from being recognition of the economic base as the prime factor ultimately conditioning the evolution of law.

5. "JURIDICAL SOCIALISM"

In his article "Juridical Socialism", in which the concept "*juristische Weltanschauung*" ("juridical world outlook") was used, Engels took a critical look at the views of the Austrian jurist A. Menger who claimed to represent the interests of the non-propertyied strata of the population in legal theory. What, then, is this "juridical socialism"? In what way is it related to the juridical outlook?

Menger criticised, from the standpoint of liberalism, the injustice of the capitalist system and also—not without reason—accused the science of law of being an apology for this system in the sense that it championed the interests of the powers that be. He even maintained that "the contemporary systems of private law are everywhere the product not of all the people but merely of the privileged sections of the population, and have been imposed by them on the non-propertyied classes in the course of thousands of years of

⁴² See, for example, G. Gurvitch, *Rechtssoziologie. Die Lehre von der Gesellschaft*. Ed. G. Eisermann, Stuttgart, 1958, S. 231.

struggle."⁴³ Menger advocated that the "individualist-coercive state" should be replaced by a "popular workers' state", which would at once set about realising the fundamentals of socialism. From this it would appear that Menger's outlook was tinged with socialism, and he certainly regarded himself as "one of the few German jurists upholding the legal interests of the non-propertied classes".⁴⁴

Menger's "socialism" is of an extremely primitive and yet dangerous nature. It is a variety of what the Germans call "Katheder-Socialism" (Menger himself held the rectorship of Vienna University), a trend close to the reformism then fashionable among German university professors, who were motivated chiefly by their fear of the revolutionary movement of the proletariat and by the desire to "refute" Marxism with the aid of a socialist model introduced from "above" by the capitalist state. And although this Katheder-Socialism was active chiefly in economic science (G. Schmoller and L. Brentano), it had exponents in other branches of learning as well.

Highly eclectic in his theoretic sources and with a good measure of conceit where his conceptual views were concerned, Menger never concealed his antipathy to Marxism. This found expression in charges—ridiculed at the time by Engels—against Marx to the effect that he had "borrowed" from Thompson and other British writers.⁴⁵

Here is a specimen of Menger's writing: "Due to the influence of Lassalle, Marx and Engels, socialist criticism in Germany is directed almost exclusively to the economic aspect of the existing social conditions, whereas in reality the social question is, basically, a problem of the science of the state and jurisprudence."⁴⁶

The rebuke addressed to Marx and Engels is completely groundless if only for the reason that they attached prime importance to the socio-political factor and, hence, to the state. Marx and Engels saw in revolution and in the state established by the working class the means needed for the

⁴³ A. Menger, *op. cit.*, S. 9.

⁴⁴ *Ibid.*, S. 2.

⁴⁵ Marx/Engels, *Werke*, Bd. 21, S. 491 ff.

⁴⁶ A. Menger, *op. cit.*, S. 2.

socialist reconstruction of society. On the other hand the Marxist teaching envisages the political and juridical superstructure as being conditioned by the economic base. Menger, however, denies this conditioning and goes on to say: "Even if we leave aside the world historic catastrophes and examine only the normal trend of law development, even then the independence of law from the economic relations in all the more important aspects will be clearly evident."⁴⁷

Characteristically, in carrying over the Dühring "theory of force" into the sphere of law, Menger ignores Engels' critique of Dühring with which he undoubtedly was conversant.

The purpose of Menger's juridical thinking is not, as he claims for it, to strike a blow against "economic fetishism"; it is rather in the spirit of reformism and Katheder-Socialism, to depict the capitalist state and law as basic factors for getting rid of the defects of the capitalist system. He is quite right in saying that in the debate on ways and means of bringing mankind to socialism the real dilemma is reform or revolution. Since he is utterly opposed to revolution, he tries to frighten the reader with the horrors likely to accompany a revolutionary upheaval, his own favourite example of the way to achieve social reform being the spread of Christianity. "Having relinquished the idea of violent social revolution, which would supposedly achieve a rapid reconstruction of all social relationships, we already discern the possibility of linking the introduction of the new social system with the existing norms of law and the state. The variety of forms currently at the disposal of our legal system could serve as models for the future social system."⁴⁸ These statements are of the very essence of juridical socialism, of Katheder-Socialism in legal attire.

Faced with the current revolutionary upswing, Menger was well aware of the dangers of a hardened conservatism incapable of any kind of skilful manoeuvring, the dangers of the uncompromising defence of classical capitalism, which was so typical of the German civil code he criticised. He advised its authors to go at least part of the way towards meeting the demands of the non-propertied classes, "without

⁴⁷ A. Menger, *Neue Staatslehre*, Zweite Auflage, Jena, 1904, S. 228.

⁴⁸ *Ibid.*, S. 250-51.

detriment to the foundations of the existing system".⁴⁹ He then went on to depict this reformist measure as a law-aided step by bourgeois society in the direction of socialism.

Marxism regards the attitude to be taken to the law of the outgoing system as part of the problem of dismantling the mechanism of the political power of the capitalist class in the course of the socialist revolution. Inasmuch as bourgeois law basically, in its main institutions and the practice of their application, can only be regarded as reflecting the interests of the dominant classes in the capitalist system of social relationships, one of the fundamental rules of the socialist reconstruction of society is the replacement (immediate or gradual, depending on the conditions at the moment) of the old bourgeois-type law by a new system of law. This, obviously, does not exclude utilisation of bourgeois law in the period preceding the socialist revolution with a view to reinforcing the economic and political positions of the working people. In the class struggle against the power of capital, the proletariat proclaims its own legal demands, takes action to secure their realisation—to the extent that the balance of class forces permits this—and upholds legality and other democratic principles against encroachment by the reactionaries.

"Juridical socialism" sees bourgeois law as a highway leading to the gradual evolution of capitalism into socialism. The ideas of the juridical world outlook, exaggerating the social function of law, provide the theoretical grounds for this approach; the result is that bourgeois law is seen not only as an absolute, but as a potential source of the socialist reconstruction of society.

6. DECLINE OF THE JURIDICAL WORLD OUTLOOK

Marxism was a completely new world outlook opposed to the bourgeois ideology and its "classical" model. The march of history, however, also brought considerable changes in bourgeois ideology, one of which was the decline in the jurid-

⁴⁹ A. Menger, *Das bürgerliche Recht und die besitzlosen Volksklassen*, S. 34.

ical outlook that accompanied the onset of imperialism and the general crisis of capitalism. And paradoxical though it may seem at first glance, this outlook had evolved from the underdeveloped law and legal system in the early phase of the rise of capitalism. The role of law was exaggerated (as was the case with other social categories in the history of social thought) for the very simple reason that its potential had not been fully realised yet, and was imagined to be greater than it really was. History, however, put everything in its place. At the time when bourgeois law had spread its wings in all directions and, in the view of the leading legal thinkers, become a fully rounded system, it so happened that the bourgeoisie was no longer able to take its stand "on purely juridical grounds". With the advent of the imperialist phase of capitalism, this state of affairs was plain for all to see.

The rapidity with which monopoly replaced the earlier capitalism, together with the growing antagonism between labour and capital, shattered the pillars of the old-time economic liberalism and "laissez-faire" and, concomitantly, the juridical world outlook. In the new historical setting, cracks appeared, above all, in the idea of the primacy and the omnipotence of law. By the turn of the century, a stage had been reached when practically all classes and groups in society were dissatisfied with the way in which the law was functioning.

Big monopoly capital felt constrained in the legal straight-jacket of the earlier industrial capitalism, but efforts to adapt the legal forms to the special requirements of the trusts and cartels met with considerable resistance. Moreover, under pressure from the numerous medium-sized and smaller business firms now experiencing the effects of the monopoly stranglehold, and due also to the continuing persistence of the liberal outlook, the state took legislative action against the trusts, the restriction of free trade, etc.⁵⁰ In this field a certain part was played by some of the ancient institutions of continental and English common law, which had arisen as

⁵⁰ For details see O. A. Zhidkov, *Anti-Trust Legislation in the USA*, p. 21; P. O. Khalfina, "Reformist Theories of the 'Supra-Class State' and Bourgeois Legislation on Monopolies", *Critique of Bourgeois-Reformist and Revisionist Theories of State and Law*, 1963, pp. 21 ff (all in Russian).

a reaction to privileges enjoyed under feudalism by craftsmen, tradesmen, etc.

In his early writing Marx makes the point that all the respect in which the bourgeois person holds the law scatters like sand the moment law acts as a hindrance to the free and unfettered play of private interest; in instances of this kind the bourgeois displays elasticity of conscience towards law as an independent entity.⁵¹ What Marx said about the individual capitalist holds good nowadays for big capital as a whole. Incidentally, one of the bourgeois theorists of those days, E. Ehrlich, contrasted the positive law favoured by the state to an actual, "living law", and among the law-making factors engendering this "living law" he listed first of all the rules of the trading companies and other associations, in other words, a juridical expression of the structure and aims of monopoly amalgamations.

Obviously, neither anti-trust legislation nor the ideology of classical liberalism could arrest the process of capitalism developing into monopoly capitalism. Ultimately, the anti-trust laws were so interpreted that, without any hindrance to the trusts, they could be turned against the trade unions. As for the ideology of liberalism, it already implied a justification of monopoly, in much the same way as the economic sources of the process were embedded in the industrial capitalism. The old "laissez-faire" principle envisaged the development and expansion of any undertaking based on private ownership and, consequently, concentration of capital, cartelisation, etc. And just as the economic aspect of the concentration of capital and the rise of monopoly can be traced back to the old-time free enterprise and competition, the same can be said of the ideological updating that accompanied the new era of monopoly.⁵²

The spread of monopoly undermined the confidence of the middle and petty bourgeoisie in the sanctity of law. In keeping with the spirit of economic liberalism and the juridical world outlook, the law had always been regarded as the sure guarantee of the "classical" relationships of free competition for which the small businessman now yearned.

⁵¹ Marx/Engels, *Werke*, Bd. 1, S. 144-45.

⁵² V. I. Lenin, *Collected Works*, Vol. 22, pp. 200-01.

Neither the encyclopaedic tomes replete with the refined essence of law, nor the anti-trust legislation of the state provided the petty bourgeois with security against monopoly which "hews a path for itself everywhere without scruple as to the means, from paying a 'modest' sum to buy off competition to the American device of employing dynamite against them".⁵³ The former faith in the omnipotence of the law was thus gravely undermined.

The functioning law did little to instil confidence in it in the ranks of the working class. The gains won by the working class in the course of its struggle acquired the force of law only at a later period. The German Civil Code, which came into force at the beginning of the century, vividly illustrates the scorn with which the bourgeoisie spurned the elementary demands of the working people. Things reached such a pass that even the reformism of those days could not refrain from denouncing the law. Here we may recall the Menger criticism of the code, even though he associated it with the "evolutionary way to socialism".

In the imperialist phase, however, class consciousness grew much more pronounced in the working class and the workers themselves became highly organised. No longer could they be fobbed off with minor concessions on the scale of a single factory, or even on the scale of a particular industry; issues were now frequently fought out at national levels and the demands expressed in legal terms. The more all-embracing the demands, and the greater the gains in terms of legislation, the more the top levels of the bourgeoisie became dubious about the effectiveness of law. "... The state institutions, in which the rule of the bourgeoisie is organised, offer the working class still further opportunities to fight these very state institutions," wrote Engels.⁵⁴⁻⁵⁵ The more these opportunities are seized upon the more doubtful the particular law becomes in the eyes of the ruling class, and the more frequently will this class find itself in violation of the law, which is also influenced by the general trend. Lenin, likewise, noted that, with the inevitable sharpening of class con-

⁵³ V. I. Lenin, *Collected Works*, Vol. 22, p. 208.

⁵⁴⁻⁵⁵ K. Marx and F. Engels, *Selected Works*, in three volumes, Vol. 1, Moscow, 1969, p. 196.

flict a panic-stricken bourgeoisie seeks "to get rid of the legality which, though it is their own handiwork, has become unbearable to them".⁵⁶

This new confrontation, spilling over into the ideological sphere, called for a revaluation of values. The Russian jurist P. Novgorodtsev, in his *Crisis of Legal Consciousness*, wrote: "Law as one of the foundations of social life is losing that title to universal remedy that it has enjoyed in the eyes of generations educated in the traditions of the French revolution. . . . The belief in the omnipotence of the principles of the law, in their ability to establish the radiant kingdom of reason on earth, has outlived itself. The 19th century showed that law alone was powerless to effect the complete reconstruction of society."⁵⁷ The statement neatly summed up the loss of faith in any adequate social effectiveness of law, a belief that had formed the bedrock of the earlier bourgeois ideology.

Whereas Novgorodtsev and other jurists of the bourgeois-liberal school regretted the decline of the old beliefs, many writers insisted on the need to abandon the legal illusions of the 19th century.

The militarist-imperialist line followed by monopoly capitalism necessitated ideological supports of a nature that the juridical world outlook was powerless to provide. Force moved into the foreground, declaring itself the source and measure of all things, including the law. Victory in war, for example, was now held up as the criterion of law, of legality and of justice (E. Kaufmann and others).

Another line, this time non-militarist, also argued a realistic approach to the times, recognition of the "evolutionary crisis" and new, fundamental approaches. "The ground is giving way under our feet, and it is useless to contend that the domain of law has remained unchanged and immovable amid the universal and radical changes taking place in the realms of the law."⁵⁸ When we turn to the Duguit doctrine we shall see that it subjects to scrutiny many, if not most, of

⁵⁶ V. I. Lenin, *Collected Works*, Vol. 16, p. 311.

⁵⁷ P. Novgorodtsev, *Crisis of Legal Consciousness*, Moscow, 1909, pp. 12-15 (in Russian).

⁵⁸ P. Vinogradoff, *Principes historiques du droit*, Paris, 1924, p. 166. The term "evolutionary crisis" is also his invention.

those concepts and principles which had been the stock-in-trade of the pre-monopoly capitalism; the hitherto heavily emphasised individualism was replaced by "solidarism" (aimed simultaneously against the Marxist teaching on class struggle), the categories of subjective justice and sovereignty were rejected, in the interests of big business the principle of inviolability of private property was amended and, lastly, the state was relieved of its "night-watchman" role and elevated to the status of the "working corporation".

This reorientation of bourgeois ideology, inspired by the advent of the monopoly phase of capitalism, found expression, not only in a new evaluation of law and its possibilities, but also in a considerable shifting of accents in the actual legal superstructure itself. Of these, the most substantial was, undoubtedly, the repudiation of the hitherto unquestioned authority of legality regarded hitherto as the basis and perfect expression of justice. This was the predominant feature of the numerous and varied theories that sprang up in bourgeois jurisprudence at the close of the 19th and beginning of the 20th century. The well-known French jurist Fr. Gény wrote that almost the only feature uniting the legal researches of the first two decades of the new century was a direct and final rejection of the illusion that written law could encompass the entire content of law."⁵⁹

It was no accident that the crisis of law consciousness, i.e., loss of faith in the possibilities of law, coincided with the so-called autonomous law movement which advocated extension of the area of judicial discretion. The Russian lawyer Pokrovsky correctly pointed out that the demand for judge-made law sounded all the louder "the more negative the attitude of its exponents to positive law".⁶⁰

It would be wrong to imagine that the juridical outlook was associated with any underrating of the role of justice. The opposite is true, for the ideology of the victorious bourgeoisie always stressed the importance of the courts of law.⁶¹

⁵⁹ Fr. Gény, *Science et technique en droit privé positif*, Premier partie, Paris, 1925, p. 37.

⁶⁰ I. A. Pokrovsky, *Fundamental Problems of Civil Law*, Petrograd, 1917, p. 66 (in Russian).

⁶¹ This found architectural expression in the Palaces of Justice erected in Brussels, Leipzig, Milan and other cities. The palaces were

In the common law countries, and especially in the United States, the court and its social tasks and functions were crucial to the ideas of the juridical world outlook.⁶²

Owing to the very nature of commodity production, the independent private manufacturers in their production connections and exchange relationships needed a mutually acceptable arbiter in the numerous conflicts that were part of the everyday atmosphere of private enterprise. It was important to create an atmosphere of awe around the courts, since these institutions were assigned a special role in suppressing the struggle of the working people against the power and privilege of the capitalist owners.

The "autonomous law movement" was symptomatic of the crisis of the juridical outlook not so much from the standpoint of its elevating the prestige of court and judge (this was also very much a part of the juridical outlook) but rather because it detracted from the role of written law and implied a lack of confidence in it.

The "crisis of law consciousness" reflected the methodological reorientation which was typical of bourgeois social science as a whole and had assumed rather painful forms. This reorientation was most clearly expressed in physico-philosophical notions and was subjected to profound epistemological and ideological analysis by Lenin in his *Materialism and Empirio-Criticism*.

The crisis in physics and its philosophical interpretation was accompanied by "a general débâcle of principles",⁶³ and in legal ideology there took place, as we have already said, a far-reaching and painful review of a number of hitherto

designed to symbolise the rule of law and the importance of justice in Europe. The biggest of them, in Brussels, was erected on the highest point in the city of those days, thus embodying the rule of law. However, the urban sprawl since then has defeated the dream of the architects. This architectural evolution in turn reflects, symbolically, the fate of the juridical outlook.

⁶² A. Starchenko, in his *Philosophy of Law and the Principles of Justice in the USA* (Moscow, 1969, pp. 6 ff, in Russian), draws attention to this point. However, his thesis that the 150-year predominance of the juridical outlook in the United States was due to special historical circumstances (not indicated by the author) is, to say the least, debatable.

⁶³ V. I. Lenin, *Collected Works*, Vol. 14, p. 253 (Lenin quotes A. Poincaré).

seemingly unassailable theses. In the sphere of physics "extreme disagreement has replaced general unanimity",⁶⁴ while the bourgeois theory of law lost that relatively monistic outlook characteristic of it earlier on when positivism ruled supreme.

In physics, the collapse of what had long been cherished truths led to denial of objective truth generally, and in the legal sphere relativism made its appearance, "a principle which, in a period of abrupt break-down of the old theories, is taking a firm hold upon the physicists, and which, *if the latter are ignorant of dialectics*, inevitably leads to idealism".⁶⁵ The spread of relativism to legal science was all the more symptomatic because in principle it has little in common with the thinking of those trained in juridical logic. According to G. Radbruch, a stout supporter of relativism in jurisprudence, there is no reason why widely differing theoretic-philosophical views on the substance of law should not be freely aired and argued, whether it be regarded as a product of human nature, as a social phenomenon or a means of giving expression to *a priori* values. Since these approaches are too contradictory to be synthesised, our knowledge of law, and similarly, our notions of what it should be, are conditional and relative; in the last analysis, science cannot provide an answer concerning the essence of law; at best, it can furnish merely a systematised notion of possible answers.⁶⁶

Although this standpoint cultivated the illusion of scientific "breadth" and "freedom" to investigate, it actually adds up to a running away, in the methodological sense, from any really fundamental substantiation of the principles of law, and equating of both the progressive and reactionary approaches to the legal reality.

Lenin pointed out that one of the results of the crisis in physics was the rapid spread of philosophical agnosticism. The same trend at this time, or rather an intensification of it, also appeared in legal thinking. The "passive agnostic-

⁶⁴ V. I. Lenin, *Collected Works*, Vol. 14, p. 254 (Lenin quotes A. Rey).

⁶⁵ *Ibid.*, p. 308.

⁶⁶ G. Radbruch, *Grundzüge der Rechtsphilosophie*, Leipzig, 1914, S. 24-42.

ism" of juridical positivism, by simply excluding a number of problems from scientific investigation and reducing the function of science to describing phenomena, became an "active agnosticism", affirming the impossibility of answering the question of the essence and nature of law as a means of scientific cognition. Juridical positivism now replaced the rationalism of the natural-law doctrine and the faith displayed by the Enlightenment in the omnipotence of reason was replaced by the restricted empirico-rationalistic approach to reality, reason being assigned the restricted function of classification and registration. Throughout this period anti-intellectualism and irrationalism acquired full rights of citizenship in bourgeois jurisprudence. This found expression particularly in the influence exerted on the theory of law by Bergson's intuitionism, Dilthey's philosophy of life and the Freudian theory.

Whereas physics overcame its crisis (as Lenin had foreseen it would) and advanced to new and higher levels, the crisis in legal ideology proved to be long-drawn-out and, ultimately, became chronic and painful, which is not to say, however, that in its subsequent evolution bourgeois law, on the overall view, did not register certain gains.

This "dividing of the ways" was due to the difference between the natural and social sciences and, equally, the difference in the objectives pursued. The crisis in physics was, in the main, a matter of overcoming difficulties encountered in the actual process of cognition as science developed, although the prevailing intellectual atmosphere at the time, and especially its basic philosophical view, was also of some significance. The actual object of research, however, was not in a state of crisis, since this object was nature and its laws, while the interests of the ruling classes of the time were best served by all-out scientific and technological progress.

The crisis experienced by bourgeois law theory was affected to a much less extent by difficulties of cognition although they did have some influence, for example, in connection with the continual development of the subject of inquiry); on the other hand, the influence exerted by the interest of the ruling class on the orientation of legal science and its findings increased enormously; to this should be added the weighty factor of the crisis processes in the very subject

of inquiry—the legal superstructure of bourgeois society in the era of imperialism.

The decline in the prestige of law, and the “crisis of legal consciousness” were regarded by many bourgeois ideologists at the beginning of the 20th century as being transient, solvable and accidental. Novgorodtsev wrote in his book mentioned above that one had only to recall the natural-law idea, and the “crisis of jurisprudence” would make way at once for the old belief in law. However, things proved to be not quite so simple. Ahead lay the World wars, the revolutionary upheavals, the rise of socialism, the world economic blizzard and other major events, all of which deepened the crisis tendencies both in the bourgeois political and legal superstructures and in legal ideology.

We have seen that the first really substantial modification in the economics of bourgeois society—concentration of capital—gravely affected the juridical outlook. Here was the proof, if proof were needed, that law, far from being the guiding hand in these processes, was in the unhappy position of having to adapt itself to them. And the passage of time would confirm this over and over again. The “all-powerful law” proved to be impotent when confronted with the ravages of the 1929-1933 world economic crisis; once more, a hasty reassessment had to be made of many of the cherished ideas associated with the theory and practice of the old classical capitalism. It was not law that had predetermined the trend towards state-monopoly capitalism, but, on the contrary, as in the case of the concentration of capital and the rise of monopoly capitalism, law was forced to adapt to the new socio-economic set-up. For the Marxist there is nothing surprising about this development: history had confirmed the soundness of Marx's formula that law and the legal superstructure derive from the economic base. Thus the leading postulate of the juridical outlook had failed to stand the test of time.

Political developments also led to a reassessment of the view that law was at the bottom of all things. As the social base of capitalist domination shrinks and class antagonisms sharpen, the more shattering the social cataclysms and upheavals experienced by the capitalist world in the course of its general crisis become the less the powers that be rely on

the machinery of law for the purpose of achieving their aims and on the legal system coming to their rescue. The tendency is to impart to the administrative-bureaucratic apparatus, now becoming more closely interlocked with monopoly capital, a greater freedom of action. The fear that opponents of the regime, above all the working class, might invoke the law in support of their claims, now haunts the bourgeoisie at every step.

This swing away from democracy towards reaction—Lenin qualified it as the dominant political features of the imperialist era—constantly aggravated the crisis of legality with an inevitable loss of respect for law.

The decline of legality and the rejection of legal principles reached the culminating point in the practice of the fascist regimes. Indeed, the striking feature of capitalist society ever since the onset of its general crisis is a disharmony in the sense that the considerably enhanced role of the state has nowhere been accompanied by an adequate increase in the role of law and its functions in everyday life; the glaring examples were the fascist regimes, when this disharmony reached catastrophic dimensions.⁶⁷

In the 1940s, that is, some decades after Novgorodtsev's book on the crisis in jurisprudence, the American law expert R. Pound expressed the same view, but in much sharper terms: "Law today throughout the world labors under a difficulty which explains much of the attack upon legal institutions and justice according to law which has been manifest for a generation. People are dissatisfied with law and are willing to try experiments in government without law because they feel that, as one might put it, law has not been operating lawfully. . . . A regime of force tries to do the work of a regime of law."⁶⁸

The author finds the reason for this change of heart on the part of the bourgeoisie (whom he refers to as "people") in the evolution from the agrarian society of the previous century to the industrial, urbanised society of today.

⁶⁷ For details see *Contemporary Bourgeois Teachings on the Capitalist State*, Moscow, 1967, pp. 55-58 (in Russian).

⁶⁸ R. Pound, *Social Control through Law*, New Haven, 1942, pp. 14-15.

It is hardly correct to say that bourgeois law and the predominant juridical outlook were adapted to the requirements of an "agrarian society". The point is that they harmonised with the needs and outlook of industrial capitalism. The elevation of law in the life and thinking of the bourgeoisie followed by its subsequent decline had little to do with the replacement of the agrarian way of life by the industrial society. Given this logic, both law and the juridical outlook should have attained their greatest importance in the predominantly agrarian countries where capitalism was a late-comer or where it failed to pioneer industrialism. In the concrete-historical aspect, however, things were totally different.

The main reason for the "disenchantment" with law lies not in the expansion of the productive forces in society, not in scientific and technological progress and certainly not in urbanisation. The complexity of social life in its technical-production and, in large measure, also in its economic-political aspects results in a situation in which the system of legal functions becomes broader and more variegated. And it is here that the ideological process differs substantially from the developmental processes of law. As noted by the Polish researcher B. Lesnodorski, despite all the complaints about a crisis of law, its role on the whole, beginning with the 18th century, has grown all the time and is still growing, especially as an instrument of economic life.⁶⁹

The reason for the "disenchantment with law" lies mainly in the changed conditions and methods of the political rule of the bourgeoisie in the imperialist phase and throughout the general crisis of capitalism. While it is true that the monopoly bourgeoisie has never relinquished law as a means of economic and political domination (in a class-based society law is an objective necessity), the reliance reposed in it is far from what it used to be. The imperialist bourgeoisie, having lost faith in the efficacy of the legal mechanism, of its being adequate to the task of safeguarding their position, feels itself constricted in the constitutional frame, and is

⁶⁹ B. Lesnodorski, *Juridical and Administrative Elements in Modern State Reconstruction*, Paper read at 13th International Congress of Historical Science, Moscow, 1970, p. 2 (Russ. ed.).

alarmed by the prospect of the anti-monopoly movements taking advantage of the "legal opportunities". "For the majority of our contemporaries, and especially for the ruling classes, law is suspect and even scorned"—such is the view of the French lawyer G. Burdeau.⁷⁰ Clearly, this attitude to law on the part of the bourgeoisie runs counter to the objective requirements of social development.

As noted above, the discrepancy between the legal form and the socio-economic content, typical of the juridical outlook, served to justify ideologically and to cover up economic inequality, the exploitation of man by man, the privileges accruing from property and the other appurtenances of the capitalist system. Similarly, today juristic apologetics, by distorting and embellishing capitalism and shifting emphasis from the socio-economic to the legal aspects still play an important role. Recall, for example, the recent talk about "people's capitalism", about "democratisation of capital", talk made plausible, on the one hand, by the increase in the numbers of those holding small packets of shares and, on the other, by the claim that the increase in shareholding signifies the abdication of capitalist ownership.

If property and the right to own property in its traditional civil-law formulation are treated as identical, if capitalist property is reduced to no more than its property-law integument, it is not difficult to maintain, as many legal writers have done, that a mere change in the legal form of the functioning of capitalist property, for example, the introduction of the joint-stock company, of share capital instead of individual capitalist ownership, results in the "democratisation" of capitalist property, changes its very nature and retires into the background. In other words, a purely formal change is regarded as a change in substance. In reality, the functioning and the movement of capitalist property in its material and money forms, the realisation of its basic purpose—the right to appropriate the unpaid labour of others—is achieved through the medium of various legal institutions. Capitalist property as the material precondition for appropriating the fruits of the labour of others need not necessarily assume the traditional material and

⁷⁰ *A PhD*, Vol. VIII, 1963, p. 40.

legal form (possession, use and disposal of particular objects).

And while examples of this kind are many, it would be wrong not to see that on the whole the juristic apology for capitalistic relationships, based on a fetishism of law, no longer plays the role that it did in the past when it was essentially the chief method of cloaking the real relationships of economic inequality and exploitation. In the conditions of today it is impossible to bank on any success for a primitive apology such as, for example, the assertion that in hiring labour both sides to the bargain are juristically equal and free. Present-day bourgeois ideology is forced to occupy itself with new ways of justifying capitalism, couched at times in socio-economic terms. Typical in this respect is the term "welfare state". Soviet writing on the subject has noted that, as things are today, the old-time juristic approach is inadequate to the task of justifying monopoly dictatorship. "The present need is for a 'synthetic' or 'integral' approach, which implies mobilisation of the efforts of all social sciences—history, political science, and also philosophy [and I would add, political economy—*Ů.T.*], the idea being that instead of each branch acting on its own, dispersed and isolated, as suggested at one time by Jellinek, they should act jointly, on an agreed basis, with a view to a more effective realisation of their basic tasks."⁷¹ Needless to say, in this "integral" approach the role of the juristic apology will not be inconsiderable.

To sum up our review of the destinies of the juridical outlook, in our day the term "classical" bears the same relation to that outlook as it does when applied to the pre-monopoly capitalism and to economic liberalism. The evolution of bourgeois society, especially in its imperialist phase, has experienced some difficulty in trying to accommodate to the juridical outlook, which more than once—especially at times of grave crises and revolutionary movements—was out of harmony with the interests of monopoly capital. However, the unmistakable decline of this outlook, as with any other important trend in social thought and ideology,

⁷¹ I. D. Levin, *Modern Bourgeois Science of State and Law*, Moscow, 1960, p. 116 (in Russian).

is not such that one can say of it that yesterday it was with us and today it is not. Generally speaking, this could not be said of any trend because its slogans, findings and standpoints, frequently subjected to internal reconstruction, maintain their independent existence and continue to exert a certain influence long after that trend has lost its initial purpose, importance and effectiveness in the overall context of social life.

Many of the traditional features of the outlook live on to this day in bourgeois ideology, especially in jurisprudence, particularly because in certain periods they are stimulated by socio-economic factors.

7. THE PRIMACY-OF-LAW IDEA IN PRESENT-DAY BOURGEOIS JURISPRUDENCE

So gravely had fascism compromised bourgeois statehood, law, and legality, that in the post-war years the ruling classes were forced to take urgent measures to salvage their prestige. In the general democratic upsurge, the policies and ideologies were doomed to failure if they did not take account of the total revulsion of the war-weary people against arbitrary rule and lawlessness, of their yearning for a stable and democratic system of law and order. Stressing the role of law enabled bourgeois ideology to dissociate itself from the practices of the fascist regimes. Moreover, many of its spokesmen were quick to see that in the circumstances of the powerful upsurge of the anti-fascist democratic movements, law could be an insurance against the threat of a revolutionary reconstruction of society. The supporters of the "stress-the-law" line were not all of the same political colouring, of course. Many democratically-minded bourgeois writers on the subject invoked law as a counterweight to fascism and its arbitrary rule and sincerely believed in the idea of natural law and the rule of law; this same stand, however, was adopted also by the out-and-out conservative-reactionary elements, including former nazis who saw in ideological mimicry a means of working their passage to political respectability. Be that as it may, the fact is that the previous legal nihilism suddenly abated and energies

were now turned to the new task of depicting the law as an important social and moral value.

Lenin's formula to the effect that monopoly capital tends to veer away from democracy in the direction of political reaction remained equally valid in the post-war period. But now the veering was not so blatant as under fascism, a preference being shown for legal methods and more or less respectable legal forms. This attitude, too, called for a certain ideological piety in relation to law.

The development of state-monopoly capitalism was accompanied by a considerable reinforcing of the bourgeois machinery of state and of its administrative-bureaucratic potential. Hobbes in his *Leviathan* had depicted the state as a parasitic growth on the body of society; Marx, too, eloquently referred to this in describing the France of Louis Bonaparte—but these descriptions pale before the statistics of the constant and rapid growth of the machinery of state in our day.

The process of reinforcing the authority of state over society, the trend towards authoritarian rule, the decline in the powers of the representative bodies and the take-over of these powers by bureaucrats in the executive departments of state—all necessitate a good deal of ideological camouflage, which mainly consists of attempts to instill in the public mind the idea that reinforcing the military-bureaucratic potential of the state apparatus is in strict compliance with law and the constitution.

Among the liberal intelligentsia the reinforcing of the state power is a source of some anxiety. They have nothing against the process as such, since the purpose is to further, as far as possible, an uninterrupted functioning of the economy and its political structure, even if in the process the reinforced state enables the monopolies to add still more to their wealth. The point is that this monopoly-plus-state combination of forces, at a time when the social base of monopoly capital is visibly shrinking, inevitably leads to increased authoritarianism and tendencies towards dictatorial rule. This frightens the liberal intelligentsia, who have not forgotten the lessons of the totalitarian fascist state. The bourgeois class as a whole, however, is as much afraid of the use of the state by left-wing forces in the event of their

gaining power. Some bourgeois ideologists associate this increasing role of the state with the possible realisation of the structural reforms for which the broad democratic movements, with the working class to the fore, have been pressing for some time. Here, then, says the bourgeois ideologue, is an important reason for bringing right into the foreground the idea of the state being bound by the basic principles of law, for stressing the significance of law as a vital factor of social stability.

We have already noted that for purposes of falsifying Marxism and besmirching socialism, the latest version of anti-communism has selected the area of law and legality. Western democracy, we are told, rests on the solid foundation of law, and acts as a counter to totalitarian systems with their negative attitude to law. The Sovietologists have evolved a theory of 'primacy of state over law' under socialism, in contrast to capitalist society where, we are told, the opposite prevails: 'primacy of law over the state'. This counterposing of formulas, widely practised in anti-communist publications, is taken up even by some of the more moderate commentators.

It will be seen, then, that law is now assigned a rather special place in the ideological armoury of the bourgeoisie. In some countries, notably Britain, the Federal Republic of Germany and the United States, the formulae—"the rule of law" and *Rechtsstaat*—qualify for a place in constitutional terminology and now rank as official state ideology, regardless of the fact that these slogans and the juridical outlook, the "classical outlook" of the bourgeoisie, are worlds apart.

Understandably, the desire to raise the prestige of law finds a considerable response in bourgeois jurisprudence, its most concentrated expression being the widespread idea of "primacy of law". The idea permeates a number of doctrines and schools that differ fairly widely in other respects. Characteristically, a prominent place among these doctrines belongs to the "revived" natural law and *Rechtsstaat* movements, that is, the selfsame theories somewhat modernised, of course, with which, historically, the promotion of law to the forefront of ideological life was associated.

Towards the end of the last century, in an unsuccessful polemic with Marxism on the relationship between economy

and law, bourgeois juristic science sought to uphold the idea of law as the first principle of society. Now, however, the idea of "priority", or "primacy" of law is posed and upheld on different grounds, namely, in connection with the relationship between law and state. In much the same way as the Soviet jurist M. Reisner referred to the law-economy relationship as the agonising question for the bourgeois jurisprudence of the days before the First World War, the problem of the law-state relationship could well be described as the agonising question for this science in the post-war years. There is nothing surprising in this, especially if we bear in mind the tempestuous growth of state-monopoly capitalism, the increased role of the capitalist state and the vast expansion of its military-bureaucratic potential.

The Soviet researcher Arzhanov has divided the bourgeois theories of state-law relationships into two groups. One of these is strong in its advocacy of primacy of law over the state, deducing the state from the idea of law, and regarding it as an instrument for realising the concepts and principles of law. The other group, favouring *etatist* concepts, proclaims the primacy of state over law and regards law as but a product of the state. According to Arzhanov, the purpose of the first group is to initiate a cult of law, and to sow juristic illusions in the public mind, to convey false impressions concerning the omnipotence and majesty of law and its rules. On the other hand, the conception of the primacy of state is associated with the notions of a "strong", "authoritarian" type of state, enjoying an all-embracing total and absolute power in society.⁷² If we view the evolution of the bourgeois theory of law over a long period of time, this division is undoubtedly correct. But it would be wrong to say that it is typical of present-day juristic thinking. Today the field is clearly held by the primacy of law theory. Even many supporters of the authoritarian line are not at all keen to stand up and be counted as men of *etatism*; on the contrary, they prefer to associate their idea of the "strong state" with professions of loyalty to the "rule of law".

⁷² M. A. Arzhanov, *The State and Law in Their Relationships*, Moscow, 1960, pp. 7-9 (in Russian).

The primacy of law idea—and the point needs stressing—is not equivalent to the principle of legality in state administration. It includes this principle, for which, undoubtedly, it merits full marks. But when all is said and done, it assigns to law a much larger role, regarding it almost as the chief “thermoregulator” (or if not that, then at any rate the basic stabiliser) of the social processes. Many Western writers on the subject go out of their way to stress that the *Rechtsstaat* is something more than a state whose rule is based on legality, or on law and order, that it is necessary to distinguish between the state based on ordinary legality and the *Rechtsstaat*.

According to the French jurist René David, as early as the 13th century law was regarded in Europe as the foundation of the civil society (that is to say, he grants the juridical outlook a substantially wider range of action than was really the case). The whole of the further evolution of law, in David's view, is largely a matter of its self-development. While he does not claim that law determined the development of the economic system, the latter, in his view, exerted no influence whatever on the evolution of law. Leaving aside the matter of the relationship between the economy and law, David goes on to maintain that in continental Europe law pursued its way independently of the political power, that is, the state. He is prepared to admit that in England the political authority through the medium of the centralised courts of common law, and later through the rules of equity, did have a say in moulding the legal system. But, he goes on, nothing of this nature was to be observed on the continent. He resolutely refuses to see anything in the nature of a real connection between customary law and the state, or between the reception of Roman Law and the state. “In France, for example,” he continues, “Roman Law is received everywhere as ‘written reason’, by virtue of its authority, *imperio rationis*, not *ratio imperii*.”⁷³ Only in the epoch of bourgeois codification, according to David, was a close link established between law and state, a link which without justification was absolutised, particularly in positiv-

⁷³ R. David, *Les grands systèmes de droit contemporains*, Paris, 1964, p. 50.

ist theory, and became a "widespread evil". Marxism, too, comes in for rebuke by David, on grounds of its recognising the organic linkage of law and state and, what is more, "carrying this standpoint to extremes, whereas Western jurists, on the contrary, having discovered the error of such a stand, entered the lists against it and with a view to reviving the traditional idea of the close link between law and justice found it necessary to break free from the association established in the 19th century between law and state".⁷⁴ Traditionally, David concludes, the Western view is to regard law as independent of the state, thus enabling it to restrict the political authority and to act as an independent foundation of society, whereas under socialism the political authority is not bound by law.⁷⁵

Allied to primacy-of-law ideas is the view widely held in Western jurisprudence that the law is historically senior to the state. To this day the formula *ubi societas ibi jus* ("there is no society without law") persists in law studies. But similar formulations with regard to the state ("the state is as old as history itself", "the state is as old as man himself") have long been discarded in bourgeois science. The state appeared on the scene at some later stage. Hence, according to this view, law is much "older" than the state, and hence there is no regular historical interconnection between state and law. This unsound view is rendered more absurd in the light of the currently fashionable theory that as an independent institution the state is a product of modern times.⁷⁶

As we see it, the basic error of bourgeois writers on this subject is that the relationship between law and state is

⁷⁴ R. David, *op. cit.*, p. 71.

⁷⁵ *Ibid.*, p. 195.

⁷⁶ According to G. Burdeau, in France and generally in Europe, the state made its appearance only in the 16th century; a critical view of G. Burdeau's judgements will be found in the article "Bourgeois Political Science" by the Polish writer S. Rozmaryn (see *Panstwo i Prawo* No. 7-8, 1958). H. Krüger arrives at similar conclusions, although by a different approach. The existence of the state in the ancient world and in the Middle Ages is denied. For Krüger, "the state is the intellectual creation of modern Europe", and its appearance cannot be dated earlier than modern times (H. Krüger, *Allgemeine Staatslehre*, Stuttgart, 1964, S. 5-14).

viewed without regard to their common social base which also conditions their growth and nature, namely, the economic system. If we start out from the fact that both state and law are products of one and the same social and historical conditions and processes, it will be obvious how basically wrong are those who place the state above law, or, vice versa, even though, as relatively independent phenomena in relation to both the economic system and one another, they may evince a certain disharmony, come into conflict, and so on. One should not lose sight of this relative independence of the state on the one hand, and of law on the other, nor should the state be regarded as a purely juridical phenomenon or, on the contrary, law as purely a product of the state will.

A still bigger mistake would be to regard this relative independence as an absolute, negating the intermingling of state and law and leading to their "divorce", after which they once more effect reunion (reunion is inevitable, since the bourgeoisie is bound to acknowledge what practice makes so abundantly evident), but now almost as diametrically opposed phenomena.

The dialectical relationship of state and law derives from the fact that both are, in equal measure, determined by the economic system of society and both personify the two aspects of one and the same phenomenon—the political authority of a class-divided society. At the same time, the state acts as the connecting link between the economic system and law. Its role as intermediary can be expressed variously, the most obvious way being legislative acts, while the less obvious could be, for example, lending sanction to custom. If we refuse to see the sanction of the state in the court decision according to custom, this connecting link disappears from sight, as happened with the previously quoted David. And another, even more characteristic mistake of this author is "anti-historicism"; he uses a situation which has long since become obsolete (prevalence of customary law) as an argument in examining the state-law relationship in the 20th century.

Since the state acts as the connecting link between economic basis and law, it cannot, of course, create law other than that conditioned by the existing system of social rela-

tions, nor instill into law any principles other than those determined by the nature of these relations. In this sense the state is bound.

It is impossible, for example, to visualise a bourgeois state failing to reinforce as its socio-political and legal point of departure, the principle of private property and capitalist enterprise. For both one and the other, being immanent principles of capitalism, are established by law and are also legal principles; as such, they have existed for a long time. If we restrict ourselves solely to the legal wrappings enclosing the social relationships and examine the state-law relationship in isolation from its social basis, we could gain the impression of the state being bound by law. In reality, however, it is bound by the principles of the economic system—or, to put it in another way, by the principles of the given socio-historical formation. But within the limits of this general binding of the state by the factors on which it is based the state functions as a fairly independent phenomenon, and is both able and called upon to make substantial changes in the law demanded by the development of society. This characteristic of the state finds its expression, among other things, in the concept of sovereignty. State independence is manifested both in the content of its functions (to a degree it can even oppose itself to the general trend of social development) and in deciding on the ways and means of performing these functions. At particular moments it may display a tendency to resort to large-scale non-legal action; here, however, we should make the reservation that, by and large, the organisation and functioning of the economic and political structure of a class-divided society cannot objectively do without law. In deciding on the content and the form of its activities, the state is obliged to take into consideration the numerous specifically historical factors of which the existing legal system is one. But it cannot be inferred from this that the sovereign power of the state is bound by law.

Any number of examples taken from the history and also the contemporary practice of bourgeois state could be cited to confirm the theoretical propositions formulated above. Whenever economic and political interests provided the spur, the bourgeois state power never hesitated to amend

and even infringe its own law. At all times the state authority has, potentially, been above the law, and in every acute social crisis regarded itself as an authority of power exempt from and unhampered by legal restrictions of any kind. State-monopoly capitalism has been accompanied not by a tightening of the restraints imposed on the state by law, but rather by more pronounced crisis tendencies in the legal superstructure and by an enhancement of the role of non-legal methods in the machinery of state. René David, though he deals with the point in a somewhat casual manner, has nevertheless pointed out that "not always has the idea of the primacy of law preached by Western jurists been adequate to prevent abuses on the part of governments, which in fact can impose their will to the extent of the force at their disposal".⁷⁷ In effect, this reservation is tantamount to recognition of the fact that the primacy of law concept does not correspond to reality. It is not a scientific explanation of the complex dialectical interdependence of law and state, not a reflection of reality; on the contrary, it carries the problem into the sphere of the ideal and the desirable.

To those who believe in primacy of law it seems that it can be helpful in restricting arbitrary action by the state, that it can be a barrier to any *etatist* voluntarism. Actually, however, the idea of the primacy of law is based epistemologically on an exaggerated estimate of the reciprocal influence of law on social life. But this thinking simply clears the way for a voluntarist approach to law.

Of course, in comparison with the apologetics offered for coercive and authoritarian conceptions, primacy of law looks attractive. It often tends in a liberal-democratic direction. But this cannot compensate for its lack of scientific foundation. Beside, we must not forget that the idea of primacy of law in the shape of the *Rechtsstaat* theory and in other variations is often used by forces of reaction. The Soviet researcher I. Trainin has pointed out that the *Rechtsstaat* idea, though a product of liberal theory, is used by various political and legal trends. "It was even seized upon, for example, by the arch-reactionary Black Hundreds in

⁷⁷ R. David, *op. cit.*, p. 195.

tsarist Russia. It was picked up by the Russian liberals in their conflict with the democratic forces. It was also used by opportunists and social demagogues for the purpose of combating the revolutionary viewpoint on the subject of state and law. After the First World War, the German social-opportunists preached the theory of the "*soziale Rechtsstaat*".⁷⁸ History repeats itself, and today, too, situations similar to the above are not hard to find.

8. PREFERENCES TO JUDGE-MADE LAW

The idea of primacy of law and the arguments in support of it have much in common with the classical-type notions of the juridical outlook (as we have seen in David's view it is the basis of society). The similarity, however, is not as close as it seems. We must first consider what was meant by law then, and how it is interpreted by the present-day supporters of its primacy.

For the juridical conception in its so-called classical form, law was above all the act, the statute, the legislator's rational activities aimed at transforming or, at least, clearly regulating the existing social relationships.

The natural-law doctrine assumed that the actual law should be brought into harmony with the principles of natural law by the rational action of the legislator. As time went on, positivism, having rejected the natural-law idea, nevertheless maintained a most respectful attitude to legislation as the true source of law. For practical purposes, this standpoint answered the objective need to achieve developed legal systems. Statutory law, and especially codification, were the be-all and end-all of 19th century bourgeois jurisprudence, which all but idolised them. The prestige enjoyed by legislation, heralding a golden future for law was such that in due course even the historical school recognised the fact.

The supreme authority of the legislative act also decided the question of how it should be treated by the judge. The

⁷⁸ I. P. Trainin, "Concerning the Question of the Relationship of State and Law", *Izvestia Akademii Nauk SSSR, Otdeleniye ekonomiki i prava*, No. 5, 1945, p. 4.

Montesquieu formula: "The judge is the mouth that pronounces the verdict of the law," now held sway. To quote him once more: "In despotic governments there are no laws; the judge himself is his own rule. . . . In republics, the very nature of the constitution requires the judges to follow the letter of the law. . . ." ⁷⁹ Montesquieu assumed that republican rule insisted not merely on subordination of judge to law, but that it would also invest the courts with powers to enrol citizens to serve in them, so that people would fear not the professional judge holding his position for life, but the court itself. But though the tribunals ought not to be fixed, the judgments ought; and to such a degree as to be ever comfortable to the letter of the law. ⁸⁰ The bourgeoisie, as we know, rejected the elective principle in filling vacancies in the judiciary. But the idea of the judge's being bound by law was eagerly seized upon.

In its attitude to law, bourgeois legal theory today has made an almost complete about-turn. Legislation has lost its aura of brightness, a process to which the primacy of law idea has actually contributed. Since the primary aim of law is declared to be a certain limitation of the state's role, the tendency is to regard law not as a statute enacted by the state authority, but as emanating from other sources—judicial practice, custom, doctrine, the principles of natural law—all of them, to quite a considerable degree, opposed to legislation. Perhaps the least respectful in their attitude to the statute book are the American sociological and realist schools of jurisprudence. They, however, are not alone in this; it is an attitude shared by other prominent schools. The "revived" natural-law doctrine and other conceptions operating with the idea of law insist not so much on legislative embodiment of supra-legal principles as on empowering the law enforcement bodies to apply these principles and base their decisions on them *contra legem*. Normativism, an offshoot of positivism, is clearly distinguished from the latter in the sense that for it the law established by the state is largely dissolved in the "juristic norm" concept

⁷⁹ Montesquieu, *The Spirit of Laws*, Vol. I, New York, p. 75.

⁸⁰ *Ibid.*, p. 153.

which, in its normativist connotation, embraces both individual Acts and judicial decisions.

Modern juristic writing gives a great deal of prominence to the idea that law should not be identified with juristic norms. The idea involves a variety of problems. One is the problem of "law-violating legislation", which is posed as follows: are the inhuman, amoral injunctions of a government to be considered law merely because they correspond to certain formal law criteria? (We shall return to this subject in a later chapter). Another problem concerns the hierarchy of the sources of law and here there is a tendency to stress other sources and play down the role of legislation. Frequently acknowledgement of the importance of legislation today and of the principle of its supremacy in the hierarchy of law sources are hedged about by reservations of a nature that all but nullify the recognition.

Marxism, likewise, does not identify law and laws, and its founders always stressed that the legal enactment was but one of the forms of law, emerging in the course of the complex evolution of the politico-legal superstructure.⁸¹ Marx, in his time, posed the problem of lawlessness finding its legislators.⁸² The fundamental difference between the bourgeois and Marxist views is that Marxism, in resolving the problem of the law-statute relationship, far from counterposing the one to the other, explains by means of historical research how the legislative act has become a more completed and perfect form of law, compared with custom, precedent and judicial practice. Whereas in bourgeois thinking the law is counterposed to the legal statute, the latter being regarded as almost a past phase in the legal evolution of society.

G. Burdeau, starting from the general philosophical thesis that, in the course of its development, society necessarily casts aside all the outdated values, beliefs and institutions, includes statutory norms as such an institution. In an article on the subject, headed "The Twilight of Legislation", Burdeau wrote: "Any caravan leaves behind its carcasses

⁸¹ K. Marx and F. Engels, *The German Ideology*, Moscow, 1964, pp. 78-79.

⁸² Marx/Engels, *Werke*, Bd. 13, S. 444.

which, like signposts, indicate the route traversed; some of these may be insignificant, others may have the quality of greatness. Among the latter legislation deserves our attention, not so much as a pretext for a funeral oration but rather for reflecting on the disrepute into which it has now fallen."⁸³ After pointing out that the "process of disintegration of the concept of statutory law" cannot be explained on purely juristic ground, that it is the reflection of a "sociological phenomenon", Burdeau points out two other more concrete factors which, in his view, have brought about the "twilight of legislation".

First of these is the ousting of legislation by acts of the executive power, which take various forms, such as the so-called delegating of powers and the constitutional restrictions on legislation, an example of which is to be found in the French Constitution of 1958. This process is actually taking place, but it testifies not to the current obsolescence of legislation as a social instrument, but simply to the fact that some characteristic features of law, and especially its association with Parliament, are not at all to the liking of the ruling monopoly factions.

Explaining why he refuses to act in defence of statutes (we here proceed to the second part of his argument), Burdeau suggests that legislation was an excellent thing so long as its chief function was that of consolidating already established relationships. But the moment society was confronted with the task of introducing major changes, legislation was found wanting. Paradoxical though this may seem, Burdeau goes on, right now when there is an awareness of the pressing need for more solid "structuralisation" of social life, legislation has come to be regarded as unsuitable for the purpose.⁸⁴ Burdeau sees the reason for this paradoxical situation on the one hand in psychological factors (psychological explanation of the state-law processes and institutions occupies a prominent place in Burdeau's overall political view) in the shape of the dissonance between the definitive, rational and normative quality of legislation and the irrationality, confusion and mysticity typical of mod-

⁸³ *AphD*, Vol. VIII, 1963, p. 35.

⁸⁴ *AphD*, Vol. VIII, 1963, p. 38.

ern man. The reason for this state of affairs, according to Burdeau, is the supercession of legislation by another social phenomenon—the Plan, which actually reflects the confusion in the consciousness of modern society and the individual.⁸⁵

We leave aside the Burdeau formula about the “mystique of the Plan” being correlative with the decline of legislation.⁸⁶ What can and should be emphasised is that the legal forms elaborated in the course of human development are not limitless. Basically there are three—custom, precedent and statute. The history of the rise of capitalist society shows that in the legal superstructure of this society legislation played the most important part in bringing forth the new, capitalist social relationships, whereas custom acted as protector of the obsolescent, pro-feudal order. And notwithstanding all that has been written by many British and American legal experts about the powers of adaptation displayed by precedent, about its flexibility, the fact is that nowadays it is impossible to deny the decline of precedent and the increasing role of statutory law in the legal system of Britain, the US and other common-law countries. Legislation, it hardly needs saying, can and in practice often does play a strictly static, protective and conservative role. That is not to say, however, that as a legal form it is not adequate to the requirements of the social dynamic.

The important role played by legislation in creation of a new system of society in the current century is evident in the practice of socialist reconstruction. For a number of reasons, legislation ranks as the decisive and leading form of socialist law. One reason is that it has been a most effective way of effecting consistent social change required in the transition from capitalism to the new socialist forms of social life. The experience gained in building the new society affords abundant proof also of the unsoundness of counterposing legislation to plan. Planning and legislation, generally speaking, operate on different planes and relate to one another as content does to form. The plan demands the development and perfecting of statutes and legislation in

⁸⁵ APhD, Vol. VIII, 1963, pp. 39-40.

⁸⁶ *Ibid.*, p. 40.

general as its legal form. Being obligatory for all and endowed with clear-cut and normative qualities, legislation fits in with planning as the strict, all-embracing, clear-cut organisation of social production. Plan fulfilment presupposes considerable administrative-executive activity and passing of by-laws. This, however, does not detract from, but rather underlines the role of legislation, which emerges as the precise, clearly-defined democratically established basis on which these administrative-executive functions are carried out.

Bourgeois programming as one of the elements of state-monopoly capitalism and the economic functions of the modern imperialist state deriving therefrom is not founded on public ownership, goes no further than "flexible guidance" and in no way encroaches on the basic contradiction of capitalist society—the contradiction between social production and private appropriation. What can be said, however, is that the appearance of methods such as programming is proof of the material maturity of society for socialism. They can be used to further progressive aims by the democratic forces. In this respect, one cannot be indifferent to those legal forms in which the bourgeois state clothes its programming. The statutory form practised by representative bodies harmonises best with the interests of the working people in their efforts to establish democratic control over the machinery of state.

The notion that the leading role in the evolution of law is held by the legislator is wholly in line with the historically-shaped principles of democracy. This is due also to the fact that the legislator, and the other organs of state within the framework established by him, undoubtedly have greater opportunities for coordinating the functions of the various sectors of social life and for concentrating the efforts of society on the main issues of the moment. Lastly, law, by virtue of the strictness of its phrasing, is the best means for precise and clear-cut norm-making, which is particularly important in the complex relationships of a highly developed society.

For a long time the code was held in even greater respect by bourgeois law-makers than ordinary legislation. Even today most bourgeois experts on the subject laud such major codifications as the French Code Civil of 1804 or the Ger-

man Civil Code of 1896, and never tire of stressing their historical role. But when it comes to present and future codifications, the same experts are quick to change the tune. Here one encounters the identical tendencies that we find in relation to legislation generally. The Soviet jurist Kerimov points out that at the beginning of this century "bourgeois legal literature which had championed the immunity and sanctity of the existing codes began to be replaced by writing which, in addition to denying the worth of laws and codes in judicial practice, railed against the idea of codification, declaring that it had fossilised legal thought".⁸⁷

We have already referred to David⁸⁸ who, despite certain reservations, disapproves of codification. At one time, Savigny, leader of the historical school, denounced codification as the enemy of all national law development; now, however, David rebukes codification for having evolved nationalism in the sphere of law. At the beginning of the last century Savigny held that the time for codification (at any rate, in particular countries) had not yet come; David, however, now maintains that codification (at any rate, in Western Europe) is a thing of the past.⁸⁹

It is true that codification signified that the general principles of Roman law hitherto studied in the universities and the particularism of customary law had been replaced by a uniform national law established by the state; and this national law became the chief subject of legal studies. But there is little to complain about in this. The national path of legal development (not, of course, in the sense attributed to it by the historical school) is part of the objective historical process. It is another matter that in the conditions of capitalist society with its big-power rivalry and imperialist antagonisms, the national is not long in acquiring nationalistic shadings. But the blame for this can hardly be laid at the doors of the codification or of national law. And certainly rejection of codification is hardly the way to overcome nationalism.

⁸⁷ D. A. Kerimov, *Codification and the Legislative Technique*, Moscow, 1962, pp. 16-17 (in Russian).

⁸⁸ We deliberately consider the views of French jurists, who previously held both legislation and codification in esteem.

⁸⁹ R. David, *op. cit.*, pp. 60-65.

The pessimistic views of David on codification and its fate are shared by many other Western writers. Clearly they are not disturbed by the fact that as the history of bourgeois society shows, the opponents of codification were, as a rule, the reactionary or, at least, conservative forces. In earlier times, these were the feudal nobility for whom codification was seen as a means of consolidating the power of the up-and-coming bourgeoisie. In our day, it is the ruling monopoly circles for whom any extensive codification in the sphere of private law or revision of the monumental codes of the kind mentioned above would entail no less difficulty than constitutional reform, when the fundamental principles and relationships of the capitalist mode of production, exchange and distribution become the subject of public debate in the parliamentary forum. The monopoly bourgeoisie stand in dread of the numerous demands and claims likely to be submitted in the event of any large-scale codification not only by the working class but also by the small and middle bourgeoisie who, in matters affecting property relations, often clash with the big-capital interests. This, then, explains why despite their obvious obsolescence neither the French Code Civil of 1804 nor the German Civil Code of 1896 have undergone any thorough-going revision. Their obsolescence has the additional advantage for the monopolies that it enables them, via the executive authority and judicial practice, to manoeuvre this way and that in defending their interests in specific situations.

It would be wrong to infer from the foregoing that the modern capitalist state has wholly rejected codification and systemisation of legislation, just as the squeeze exerted on law by executive action does not imply its rejection. Obviously, in a developed state-organised society with its complex economic and political structure, total rejection is ruled out. It is rather a matter of tendencies which, generally speaking, do not exclude the use by the capitalist state of the legal form of statute and code when the need arises.

The Soviet writer Zivs reminds us that "any serious inconvenience arising from legislative entanglement impels the imperialist bourgeoisie to devote close attention to systemising legislation. On the whole, they are not against systemisation as such. Indeed, with the advent of imperial-

ism, a number of countries, notably Britain and the United States, which previously had shown no interest in straightening out the tangle of laws, began to tackle the problem of systemisation."⁹⁰

One cannot fail to see, however, that the latest codification measures undertaken in the two countries have been chiefly concerned with the technical aspects of judicial practice. As Imre Szabó has it, the steps taken relate "only to the external forms of codification".⁹¹

They lack the socio-political impact of the famous continental codifications of the past. In the present era of the general crisis of capitalism, even in the classical countries of bourgeois codification, the role of codification has declined and frequently it takes such modernised forms (for example, the codification by Government Decree in France during the Fifth Republic) that it is essentially no longer a matter of law-making in the strict sense, but of a special kind of delegated legislation.

The eclipse suffered by codification is reflected also in bourgeois legal theory, which confuses the issue by shifting responsibility for the decline of codification to codification itself as a special legal form. It is not in the economic and political domination of capital, but in this form as such that we should seek the reasons for the rise and fall of codification; it is not the crisis of bourgeois legality as a socio-political process that undermines the prestige of legislation and code, but legislation and code, so the allegation goes, that constitute the threat to progressive law development. In reality, as noted in socialist writing on the subject, "codified law is the most highly developed law, ensuring the fullest possible realisation of legality".⁹² And if in the capitalist world the economic and political conditions are heavily against codification, it would be wrong to conclude from this that it had outlived its usefulness and become a past place in the history of statehood. In the socialist countries, for example, codification is currently experiencing a new

⁹⁰ S. L. Zivs, *Development of Legal Forms in Modern Imperialist Countries*, Moscow, 1960, p. 121 (in Russian).

⁹¹ Imre Szabó, *Socialist Law*, Moscow, 1964, pp. 184-85 (Russ. ed.).

⁹² *Ibid.*, p. 185.

development, acting as valuable means of improving socialist legislation. And all the signs point to its having an assured future also in the countries that have gained independence owing to the collapse of the colonial system.

Just as nature abhors a vacuum, so it is with the complex and ceaselessly functioning system of law. One cannot simply bid farewell to legislation and the codes, or minimise their role. Obviously, replacement of some kind is needed. To meet this need, bourgeois theory, and especially the primacy-of-law devotees, suggest judicial practice and judicial law-making. The function of the judge, invested with wide-ranging powers, should be the centrepiece of law and its further evolution. With rare exceptions, practically all schools of bourgeois jurisprudence have suggested substituting for the correlation of "law and court", which is important from the standpoint of both theory and practice, the alternative of "law or the court", and, in arguing the case, some most categorically, others less so, question the authority of law and put their faith in the creative functions of the judge and in "judge-made law" (*Richterrecht*).

Insistence on the right of discretion for the judge and for greater freedom in handing down decisions is a constant and pronounced feature of bourgeois legal studies in the imperialist epoch and the accompanying general crisis of capitalism. It is, in fact, a constantly-growing tendency. At the turn of the century, the "autonomous law" movement, having proclaimed the aim of a broader judicial discretion, campaigned nevertheless under the slogan of free interpretation of the law while recognising its authority. Later, the idea of judicial law-making gained prominence, an idea which elevated the judiciary to a much higher function than that of interpreting the law.

It is true, of course, that even today, along with the demand for unrestricted judicial law-making, for placing the judiciary above the law, one often finds moderate standpoints anxious to combine judicial discretion with a certain conformity with law. This stand recalls the "autonomous law" conception in the first stage of its development. On the whole, however, bourgeois legal practice has undergone substantial change. At the beginning of the 20th century the "autonomous law" movement encountered considerable

opposition from the positivist theory of law which stood four-square for precedence of law and judicial subordination to law. Now, however, it is the thing in bourgeois legal theory to stress the special role of the judge.

M. Villey, commenting on this tendency (most pronounced, in his view, in Germany), expressed himself in these terms: "The judge is no longer an agent of the state authority... , who mechanically sums up the case on the basis of the evidence and, guided by the law governing the particular case, delivers his judgement; in ever-growing measure he now has a broad independence in relation to the texts; he has more of a say and he is held in greater esteem and invested with greater responsibility. Fascinated by the English model of law established by judicial practice (judge-made law), the modern doctrine (Esser, Coing, Engische, the existentialist Cohn and others) is, almost entirely committed to this path, avoiding the excesses and blunders made by some of its predecessors (Ehrlich, Isay) at the beginning of the 20th century. The German and Austrian courts are following suit... One thing can be said for certain that, before our eyes, law is ridding itself of the suffocating dictatorship exercised by abstract legislation and we are on the way to recognition of the direct link between the natural order, which determines the course of things, and the judge who pronounces the law."⁹³ There can be no doubt (Villey himself writes about this) that this orientation of West European legal science has been largely associated with the spread (especially in the decade immediately after World War II) of American models aimed at bringing continental law traditions into line with those of common law in the framework of a "common Western civilisation".

Professor Friedmann of Columbia University has expressed himself in terms not unlike those of Villey: "The Blackstonian doctrine as the 'declaratory' function of the courts, holding that the duty of the court is not to 'pronounce a new law but to maintain and expound the old one', has long been little more than a ghost. From Holmes and Gény to Pound and Cardozo, contemporary jurists have increasingly recognised and articulated the lawmaking functions of the

⁹³ *APhD*, Vol. XI, 1966, p. 269.

courts. . . . It is therefore time to turn from the stale controversy over whether judges make law to the much more complex and controversial question of the limits of judicial lawmaking."⁹⁴ This question of the limits of judicial law-making is a really difficult one because persistent tendency, so typical of bourgeois jurisprudence, to make distinctions between law and legislation, amounting almost to opposing the one to the other virtually obliterates any distinction between the right of the court to make good an actual deficiency in the law and its right to amend and revise legislation just as it pleases.

Vom Gesetzstaat zum Richterstaat (From the State of Laws to the State of Judges), such is the title of a book by the Austrian jurist R. Marcic.⁹⁵ And although the views of the author lack the straight-forwardness of his title, what he has to say is well in line with the general evolution of bourgeois legal practice. He has in mind not merely judicial law-making, or the vital role played by judicial procedure in developing the law (this role is recognised also in socialist society); the really relevant thing in the Marcic view is the counterposing of law and judge or, at any rate, the switching of the stress from the first to the second.

Advocates of this view hold that it guarantees primacy of law in relation to the state. Their interpretation of the functional separation of legislative, executive and judicial practice is such as to place the judge beyond state jurisdiction and, by the same token, to oppose judge-made law to state omnipotence. The missing link in this approach is that the existing separation of legislative, executive and judicial functions is not a division of power in society, but rather a demarcation of functions within the framework of a single state apparatus, that the judiciary, too, is a department of the bourgeois state, its immanent link. A judge may oppose a particular department of state, but never the state as such; he cannot function independently of the other links in the state mechanism; after all, his aims and his functions are those of the capitalist state as a whole. Indeed, the en-

⁹⁴ W. Friedmann, "Limits of Judicial Law-making", 29 *MLR* No. 6, 1966, pp. 593, 595.

⁹⁵ R. Marcic, *op. cit.*, Wien, 1957.

ture history of bourgeois society shows that the fundamental gains won by the working people in the shape of economic and political rights and freedoms found their way into the statute books (and not least so in the common-law countries, whereas the courts, as the "last ditch of defence", erected all kinds of barriers in the way of the requisite legislative reform. Alongside the liberals who championed the anti-*etatist* idea, there are among the supporters of judge-made law not a few archreactionaries who dread the democratic potential of parliamentary action.

The supporters of judge-made law assure us that the bourgeois court of our day is a long way from being what it was in times past, when it really did serve the money-bags (confession of past sins is typical of modern bourgeois ideology). They readily refer to some genuinely sound decisions passed by the US Supreme Court, specially with regard to racial segregation and political rights. But surely the reasons why these decisions have attracted so much attention is that they are not characteristic of the overall situation and the role of the bourgeois court, but rather the kind of democratic action to which, from time to time, other departments of state as well must resort to repair their public image. Conservatism, snobbishness and isolation from the ordinary people are well-known traits of the judiciary, candidates for which are not democratically elected but handpicked on a strictly class and political basis.

For the juridical world outlook, omnipotence of the judge was the sure sign of the despot state. In our times, it is pictured as the necessary attribute of the "primacy of law", of the "rule of law". The slogan of the Enlightenment, "from the rule of people to the rule of law" seems to have gone into reverse, law itself having turned into its antipode. History is expected to move in the shape of the peculiar triad—from the arbitrary tribunals of the Middle Ages to subordination of the judge to law, and thereafter, by way of synthesis, back once more to "free judicial discretion".

To a considerable degree, judge-made law reflects the actual processes under way in the political-legal superstructure of capitalist society. In addition to the considerable influence exerted in the post-war years judicial law-making and still exerted in the common-law countries, it should be

noted that on the continent too, the process of adapting the law to the requirements first of monopoly capital and later state-monopoly capitalism, is effected chiefly by way of judicial and administrative practice. The inevitability of legislative concessions to the working class has, understandably, enhanced the judge's importance in the eyes of the bourgeoisie. The judges act as the "supreme last-ditch defenders of property".⁹⁶ Free judicial discretion enables big capital to nullify democratic legislation, to adapt particular legal instruments to its needs without official legislative action or repeal and, lastly, to ignore the constitutional and procedural barriers when seeking to pass reactionary legislation. The ruling classes in capitalist society find it useful to enhance the prestige of the judiciary also with a view to influencing the public ideologically because the court of law suggests that the existing system is just and right.

Nonetheless, one cannot fail to notice that in the organisation and functioning of the machinery of state in the main capitalist countries the judge is accorded a much more modest status than is the case in many legal theories. In none of these countries is there anything even remotely resembling the rule of judges. While it is true that after the Second World War a certain extension of judicial powers was introduced to harmonise law-making with constitutional practice, the offices established for the purpose have hardly any role whatever in the mechanism of the capitalist state. Constitutions and the appropriate legislation governing court structure and court procedure proclaim the subordination of judge to law.⁹⁷ Even in the common-law countries, legislation has considerably encroached on the common law in some important spheres of public life, despite the fact that legislation is still regarded as a source of law whose application requires judicial interpretation.

Although much has been said, and vociferously so, about placing law based on legislation and judge-made law on an equal footing, Article 5 of the French Code Civil, forbid-

⁹⁶ J. Gollan, *The British Political System*, London, 1954, p. 145.

⁹⁷ *Constitution of Italy*, 1947, Art. 101; *Constitution of Japan*, 1949, Art. 76; *French Constitution*, 1958, Art. 66; *Fundamental Law of Federal Germany*, 1949, Art. 97.

ding judges to pronounce sentences likely to be of a general validity, is still in force; similar enactments are in force in other European countries.⁹⁸

In the mid-1950s, the West German Bundestag debated a bill on the law-judge relationship which contained the formula: "the judge is independent and subordinate only to the law". The wording was severely criticised in the country's legal literature. During the debate Ernst von Hippel declared that this formula and the Bill-stipulated oath of loyalty on the part of the judges to the Constitution and the law were a return to the positivism condemned by history. "The philosophical untenability of a naked naturalism, including the pure legal positivism, is so obvious nowadays that there is no need to dwell upon it." Insisting upon a completely free hand for the judge in relations to the law and that he should have the right freely to express the idea of law and of natural-law principles, Ernst von Hippel went on to say that even the Fundamental Law of the Federal Republic of Germany had rejected the positivist notions of law held in the days of the Weimar Republic.⁹⁹ Paradoxical though it may seem, von Hippel drew heavily on Montesquieu, urging on the one hand a more precise definition of his "unclear" propositions concerning subordination of the judge to law, and, on the other, a fuller restatement of his ideas about sharing authority, and respect for a "third authority". However, despite all the objections aired in legal literature in West Germany concerning subordination of judge to law, Article 25 of the Bundestag law on the judiciary, enacted in 1961, reproduced the formula "the judge is independent and subordinate only to the law".

It would be wrong to infer that in reaching this decision the bourgeois state was motivated by purely ideological and propaganda considerations. Such aims certainly could be served by the foregoing article subordinating the judiciary

⁹⁸ "Article I of the Swiss Civil Code, with its clearly expressed recognition of the creative aspect of juridical practice, while not altogether a dead letter, has not produced anything in the nature of a revolution." (R. David, *op. cit.*, p. 129). Bourgeois legislation never followed the Swiss example.

⁹⁹ E. von Hippel, "Die Rechtssprechende Gewalt und das Richtergesetz", *Juristenzeitung* No. 1, 1956, S. 2.

to law and to natural law, a point which was made when the Bill was debated in the Bundestag. But such was not the case.

The function of the capitalist state is in all circumstances to uphold the common interests of the capitalist class, to clear the way for capitalist production. The complex technico-economic and socio-economic aspects of the developed capitalist society of our day, the great intensity of the class struggle, the need for state intervention to buffer the keen contradictions of the capitalist system, the rivalry among the monopoly groups and the internal differentiation in the bourgeois class, all add up to a situation which, objectively, makes it impossible for the state to give free rein to the subjective discretion or judgement of a "third power".

But, as pointed out, the right to exercise juridical and administrative discretion can be beneficial also to the dominant classes in society and to the ruling circles in the sense of furthering their economic and political aims.

The point is that the one does not exclude the other. The political power of capital prefers not just any kind of free judicial and administrative discretion but a discretion subject to guidance. While retaining subordination of the judge to law, it also disposes of ample means to make application of the principle reasonably flexible. This is the case, for example, with the so-called elastic norms, the abstractly vague criteria and legal terms of reference, that is, all the forms that give the law a deliberate vagueness and contain in themselves the sanction of free discretion. This example comes under the heading of what we might call juridical possibilities. A similar possibility is the absence of any regulation (or extremely general regulation) of important areas of social relationships. Besides the juridical there is also the political or administrative possibility. And finally, there is the ideological aspect. What might be described as a "division of labour" takes place between the machinery of state and the theory of law. The state opts for a flexible manoeuvring with the idea of subordination of judge to law. Legal theory supplies the ideological justification for this, giving juridical and administrative practice the theoretical grounds that enable it to display its class nature and awareness in those cases when the legislator and the state power

as a whole are forced by political conflict—especially during an upsurge of the overall democratic movement—to make concessions and are left with little opportunity for manoeuvre.

Post-war West Germany (a country where the doctrine of the powers of the judge has found clearest expression) was confronted with the task of rehabilitating legislation in the conditions of a resurgence of anti-fascist, democratic sentiment. The reactionary elements, understandably, reposed a much greater confidence in the courts than legislation. The independent judge was to act as a counterweight in the event of far-reaching legislative concessions to democratic public opinion. There had been an essentially similar situation in the Weimar Republic after the First World War, when the *Reichsgericht* and the judicial caste acted as a counterweight to the Social-Democratic Government then in power.

But things were more complex after the Second World War. The question of the judge's relationship to the law had also acquired a more complex ideological form, involving the whole range of problems associated with the "revived" natural law, but basically the manoeuvre was the same. With West German monopoly capital consolidating its positions and the Bonn Government beginning to rebuild the military-bureaucratic potential, the natural-law interpretation of judiciary functions was couched in far moderate terms. Although judge-made law came in for a boosting, the main thing was to "tackle the new problems and make the return journey to the rule of law".¹⁰⁰

The Swiss jurist, O. German makes the following point: "The judge himself has no right whatever to regard as not binding a particular norm which he holds to be unjust. Something different might correspond to the extreme natural-law viewpoint, but it would completely devalue positive law as the guardian of the stable law and order that is essential in our complex social life. Admissibility of juridical decisions *contra legem* is not, generally speaking, the sole criterion of the fundamental difference between positivism and

¹⁰⁰ H. Hirsch, "Richterrecht und Gesetzesrecht", *Juristische Rundschau* No. 9, 1966, S. 342; R. Marcic, "Der Richter in der Demokratie", *Juristische Blätter* No. 15/16, 1968.

an evaluative-critical law-seeking [*Rechtsfindung*]. In everyday practice, under normal circumstances, that is, the distinctions made in interpreting the law and in applying it are often much more significant."¹⁰¹ German insists (rightly so) that the evaluative-critical method of supplementing the law already in force is far-removed from positivism and entails its real (not extremist) refutation. Evidently, German's standpoint is the most adequate response to the requirements of the modern capitalist state "under normal circumstances"; on this latter point, German is adamant. However, in extraordinary circumstances, there comes into force the unrestricted right of the judiciary and of the police-administrative machinery to use their discretion, and, in this eventuality, as we have seen, they have at their disposal the ready-made theories enabling them to claim justification for any violation of the Constitution.

Thus the predominance in modern bourgeois legal theory of the special role of the judiciary, plus the strivings to invest it with law-making functions, add up to a sceptical attitude to law and to the legal codes, to a complex interlocking of the world of reality and ideology. In this, there is a considerable element of theoretical turbulence, of misgiving, when what is desired is taken for the real thing, and the actual processes (including the greater discretionary powers of the judiciary, ousting of legislation by means of enactments by the executive authority, etc.) lose the semblance of reality.

9. DOES MARXISM UNDERRATE LAW? THE NEW CRITICISM OF MARXISM

At the turn of the century, when the concentrated drive against Marxism by Stammler, Menger and others ended in fiasco, bourgeois jurisprudence, changing its ways and adopting the tactics of silence, tended to turn a blind eye to Marxism. It was conceded that Marxism could, possibly, be described as an economic theory in which law had hardly any place

¹⁰¹ O. German, *Probleme und Methoden der Rechtsfindung*, Bern, 1967, S. 246.

and which, at best, regarded law as something entirely negative. Eventually, this view was extended also to the socialist reconstruction of society inaugurated in Russia in the wake of the October Revolution.

Bourgeois propaganda depicted the repeal of all laws enacted prior to November 1917, that is, the negative attitude adopted by the young Soviet State to the old bourgeois-feudal legal system, as a basically negative attitude to law in all circumstances, which, allegedly conforms to the spirit of Marxism. And despite the fact that barely five years after the revolution a full-scale codification of the new Soviet law had been carried out (in point of fact, the speediest codification known to history so far), bourgeois propaganda continued for many years to harp on the theme of the non-existence of law in the USSR. And even now, after a lapse of 50 years or more, the outspoken anti-communists still make such assertions.

After the Second World War, however, the thesis that Marxism had failed to produce a theory of law was subjected to revision. Whereas in 1955 Kelsen was still talking about the "failure" of the Marxist attempts to produce any worthwhile consistent legal theory,¹⁰² by the arrival of the 1960s, hardly a single serious law expert in the West would subscribe to the Kelsen view. M. Villey, for example, points out that while Marx did not write specifically on the subject of law and never regarded himself as an exponent of the philosophy of law, "this does not prevent us from naming him as one of the greatest or, at any rate, one of the most significant masters of the philosophy of law. In the final analysis, Marx stands out as greater philosopher of law than the founders of bourgeois jurisprudence—Hobbes, Locke, Rousseau, Kant and Hegel; he was experienced in and concerned about law in quite a different way from them."¹⁰³

Admissions of this nature, and they are quite numerous, prove that unfounded statements and denunciation of Marxism no longer yield political dividends. However, one should not bank too much on these acknowledgements, at least not where their ultimate purpose is concerned. The theme of

¹⁰² H. Kelsen, *The Communist Theory of Law*, London, 1955.

¹⁰³ *APhD*, Vol. XII, 1967, p. 216.

bourgeois "juristic Marxology" runs something like this: Yes, we (the bourgeois experts, that is) readily acknowledge that we were mistaken in disregarding Marx's doctrine of law; we are now correcting our mistake. We render homage to the originality of his teaching and we recognise his scientific merit. But now, too, after much re-examination and rethinking, we can reaffirm our view that, when all is said and done, Marxism underrated law and awarded it by no means high grading in the system of public institutions and values.

K. Stoyanovitch ends his voluminous work *Marxisme et droit* (Marxism and Law) with the following words: "I thus conclude my speech in defence of law in face of the hostility to law manifested by the Marxist doctrine".¹⁰⁴

It follows, therefore, that compared with the past, it is the approach and the method used in the criticism that have changed, not the substance. Marxist law theory is no longer belittled nor dismissed out of hand; on the contrary, it is widely and minutely studied, but the critics' fundamental conclusions, though now presented in a more respectable form, remain unchanged. Whereas the founders of Marxism accused the bourgeoisie of seeing the life of society through juristic-coloured spectacles and considerably overrated law, Marxism, on the other hand, is charged in reverse (largely due to legal-world-outlook hangovers) with underrating the role of law and its social usefulness.

This particular thesis is made the pretext for saying that in socialist society, based on Marxist principles, law is accorded so much of a secondary role that it is not so highly developed as in bourgeois society, and even if it does move nearer to perfection, this can mean one thing only—a retreat from the consistently Marxist view and a turn towards convergence with the "perfect" model of bourgeois law.¹⁰⁵

¹⁰⁴ K. Stoyanovitch, *op. cit.*, Paris, 1964, p. 391. He is also the author of *La Philosophie du droit en URSS (1917-1953)*, Paris, 1965.

¹⁰⁵ As an example of this thinking, we recall the claim made by H. Berman to the effect that the very existence of socialist law signifies a break with the spirit of Marxism. See his *Justice in the USSR. An Interpretation of Soviet Law*, New York, 1963, p. 167. A criticism of this book is to be found in the magazine *Sovietskoye gosudarstvo i pravo* (No. 8, 1965, No. 4, 1969).

Thus capitalist society and its ideology claim the role of champions of law in the confrontation with Marxism, whereas in reality law is not in the slightest need of any such defence.

In the endeavour to prove Marxism's allegedly negative and even hostile attitude to law, Western critics make great play with the withering-away-of-law idea. The Marxist thesis concerning the withering away of the state and law in communist society is interpreted by its critics in the sense that, at best, Marx and Engels regarded law as an inevitable but, fortunately, transient evil. The charge is then made that, by affirming the withering away of law, Marxism was the first major teaching "to put law in the dock".¹⁰⁶

The US writers, Howard and Summers, have expressed the view that at different times the question whether law was or was not necessary evoked both affirmative and negative answers. Communist theorists on the subject, they aver, are among those who replied in the negative. Their grounds for the claim rest on quotations from the writings of Lenin, Stučka, Pašukanis and Golunsky concerning the withering away of the law in the communist society of the future.¹⁰⁷

According to some Western ideologists, the doctrine of the withering away of law is tantamount to rejecting law completely and testifies to the negative attitude adopted by Marxism to law and to legal conceptions.

Applying such logic, anyone using the expression, say, "man is mortal" could be denounced as a misanthrope. Surely the point about the withering away of law is that it relates to the historical perspective, not to its role in a class-divided society with a highly-organised machinery of state. Incidentally, Marxism also speaks of the future dying away of the state. Yet bourgeois critics, far from describing Marxism as being hostile to the state, on the contrary, rebuke it for—in their terminology—*etatism*.

One other circumstance is not without interest. Whenever bourgeois writers on the subject of law accuse Marxism of belittling law, they present law in an utterly subjective light, so that its withering away appears to be the abolition of

¹⁰⁶ K. Stoyanovitch, *op. cit.*, p. 391.

¹⁰⁷ Ch. Howard, R. Summers, *Law, Its Nature, Functions and Limits*, Prentice-Hall, 1965, pp. 23-27.

human rights and of their legal guarantees. This results in a logical hiatus, since in speaking about the withering away of law, Marxism has in mind least of all any annulling of man's rights and freedoms (on the contrary, the nearer we get to communism, the more the rights and freedoms are extended), but rather the ending of state compulsion as the specific feature imparting to social norms the quality of law.

Nor does withering away of law portend that all rules of public behaviour presently functioning as legal norms will disappear from the scene in the future society. Some will, of course, if only because the social factors and relationships which necessitated their presence will, likewise, take their departure. But there will be some which, appertaining to the most essential rules of community life, will retain their validity, but not without shedding their previous legal aspects. As the process of withering away continues community-moral sanctions will become an alternative to the outgoing legal sanctions and, in due course, replace them altogether. The process is not, as depicted or imagined by the critics of Marxism, a contest of society and morality against law; rather it is a profound internal evolution of law wholly in line with the evolution of society. In terms of practice, the twilight of law signifies also the twilight of such features of normative regulation as (1) state compulsion and (2) application of an equal scale to unequal relationships, that is, going over to the principle of "to each according to his needs", while maintaining the system of norms of community life and maximum extension of human rights and freedoms. Another accompaniment of the withering away of law will be a considerable modification of the entire normative system regulating man's behaviour in society, but not an anarchistic abolition of the system as such. By no means does the future withering away of law detract from its role in the socialist society or indicate a tendency for it to be discarded. It would be truer to say that in the course of the actual process of building communism there is an enhancement of the organising functions of law and legality in all the main areas of social life.

As correctly stated by the above-mentioned American writers, Howard and Summers, anti-law tendencies have frequently made their presence felt in social thinking. However, before including Marxism in this category, the authors might

find it worth while to ponder over the following. Among those who in the past century made no bones about their ultra-negative views on the subject of law were the writers Stirner, Proudhon and Bakunin. But who could have been more critical of the views expressed by these authors than Marx and Engels? In fact, two of their works—*The German Ideology* and *The Poverty of Philosophy*—were specific refutations of the views on law and justice variously expressed by the above-mentioned trio. It is in this critique that we find the proposition that political and civil legislation is conditioned by the demands of the economic relationship and following from this the idea that law is necessary to the life of society. On the one hand, Marxism rejected the extremes of the juridical world outlook with its exaggeration of the role of law and, on the other, the reverse extremes of legal nihilism. And we might add that in our times, too, Marxism has no scruples whatever about consigning to the dustbins all ultra-leftist, anarchistic attitudes to law.

Another debunking-of-Marxism approach dear to the hearts of the bourgeois law students concerns the primacy of the economic basis in moulding, among other superstructure phenomena, law. From this they infer that, at best, Marx regarded law as "second-class" article, as wholly lacking in independence, as an appendage, subordinate to the economy and of little consequence for the development of society and its destiny. Moreover, as a replica of the economy law, it is alleged, cannot have any spiritual values of its own, and is thus deprived of dignity and rendered incapable of doing anything worth while for justice and other ideals. The American professor Stumpf, in his critique of the Marxist view on the economy-law relationship, resorts to this not unoriginal comparison: "Law is the tail which follows the animal, and wherever the animal goes the law is sure to follow."¹⁰⁸ Leaving aside the banal and hackneyed charge of "vulgar economism", one should not simply shrug off its possible propaganda effect, since for some readers in the West the idea of "economics" conjures up Big Business and all its associations.

Marxism is explicit in saying that law cannot be explained other than in terms of its being conditioned by the socio-

¹⁰⁸ S. E. Stumpf, *Morality and the Law*, Nashville, 1960, p. 63.

economic system of society. But this does not imply that law is nothing but a plaster cast of the economy. Marxism has repeatedly drawn attention to the fact that if law were determined solely by the economy and, what is more, in the most direct way, it would be simply impossible to explain why the forms in which law expresses similar economic conditions vary very much indeed. And conversely, relations differing in their socio-economic essence may be similar in the way they are regulated by law. A marked imprint is left on law by various factors like the political conditions, the dominant ideology, and in some epochs, by religion, the national mentality, historical traditions, etc. Moreover, in a developed society the state in its law-making functions is compelled to reckon with the established legal system. Marx specially pointed out—and Lenin subsequently developed the idea—that law gains much of its colouring from the level of culture obtaining in society.¹⁰⁹ In view of all these factors the legal expression of economic conditions is extremely indirect.

Further, Marxism has never asserted that law does not play an important part in the process of social advancement, and its opponents argue in vain that, having granted the possibility of a negative influence by law on the system of social relations and its development, Marxism contradicts itself or, at least, appears to contradict its own thesis concerning the legal superstructure being conditioned by the economic basis. The materialist conception of law, by considering law in its interrelation with the social structure, proves to the hilt the very real and effective way in which this structure and the course of social development are influenced by law. Moreover, it possesses perhaps a relative but still significant degree of independence with regard to the socio-economic system. It can function in harmony with the social development (including the economic), but it may also run against it. But the range of action of the legal institutions and norms that retard social development, artificially preserve survivals of the past, or, on the contrary, that try to skip the necessary stages of development, turns out to be quite limited, because law as such cannot abrogate the objective laws of development of society. At any rate, law is never passive in respect

¹⁰⁹ K. Marx and F. Engels, *Selected Works*, Vol. 3, p. 19.

of all the vital spheres of public life and always functions as an important factor in consolidating the social relations which have taken shape, in some cases actively promoting the establishment of new relations. Law also exercises a palpable influence on the economy, and the more complex the economic mechanism of the state-organised society, the stronger is the influence it exerts in many concrete directions.

According to some of the bourgeois law schools, the law-maker or legislator merely "discovers" law, which appears spontaneously and independently of him. Such, for example, is the view of the historical school and of some of the sociological schools and also of the phenomenology theory. According to this view, the legislator "discovers" norms of law in much the same way as mathematical laws are discovered. Marxism, however, as distinct from this purely automatic approach, emphasises that the objective conditioning of law by the economic basis by no means rules out the voluntary, conscious participation by people and classes as a vital constitutive element in elaborating and developing law. Law, which never emerges directly from the economy, is the product of the class-willed activity emanating from a particular socio-economic basis, and the basis is expressed in law precisely through the medium of this class-willed activity. And as is the case with any activity, the law-making process both in society and at state level is complex and multiple.

Naturally, in this class-willed law-making process, politics and political interests play a substantial part. The economic is refracted in law via the political, in the sense of social, class and group relations expressed in the forms, functions and content of state activity. The well-known Marxist thesis concerning the interlocking of law and politics pertains to government influence on law-making which, in turn, serves the purpose of furthering government policy. Lenin's point that "laws are political measures, politics"¹¹⁰ by no means signifies sacrificing law to politics, as is often claimed in Western criticism of Marxism. When Marxism refers to law as a form or means of carrying out policy this is certainly not meant to be an exhaustive definition of law; it does, however, emphasise one of its aspects. Regarded as an in-

¹¹⁰ V. I. Lenin, *Collected Works*, Vol. 23, p. 48.

strument of carrying out policy, law is not merely its passive form, but a factor which in turn can influence both the content of the policy and its implementation.

Some Western legal experts readily grant that Marxism, with its stress on the close interconnection between social life, the socio-economic system and politics, on the one hand, and law, on the other, has furthered the demystification of law and has put research on the subject on a solid sociological footing. At the same time, Marxism is accused of seeking to deprive law of its moral purpose, of debasing it as a spiritual value and as an expression of justice. These accusations are prompted by the notion that justice and other social values and ideals are born of the "pure consciousness". But since this is not the case, since social values and ideals are very much part of social being, the view that law is conditioned by social life provides the only genuinely scientific grounds for answering the question: How and in what way does law correspond to the social values, ideals and requirements of social progress?

Thus the fact that Marxism regards law as a secondary social phenomenon in relation to the economic basis cannot be read as an underrating of law, as seeing it as a second grade article. To demonstrate the importance of any public institution one is not obliged to shout from the housetops about its being primary and fundamental.

When the juridical world outlook stresses the role of law in society, Marxism is far from denying this outlook. Marxism opposes the exaggeration of the role of law, the fetishisation of legal forms, but in its explanation of the motive forces and regularities of the development of class society it pays tribute to the importance and dignity of law.

In the new socialist society it would be difficult indeed to overestimate the role of law. One of the basic trends in the development of the political organisation of socialist democracy is the steady streamlining of law and legislation, undeviating observance of legality, enhancing the prestige of law and educating people in a spirit of respect for law.¹¹¹

¹¹¹ 24th Congress of the CPSU, Moscow, 1971, pp. 94-95.

Chapter Two

JURIDICAL POSITIVISM

Having examined certain aspects of bourgeois legal ideology as a whole, we now essay a more detailed description of the main trends in bourgeois law. We shall begin with legal positivism as a permanent and enduring trend in juridical-theoretic thought which has long, and with every reason, been regarded as its most typical model.

1. THE "CLASSICAL" POSITIVISM. POSITIVISM AS NEGATION OF NATURAL LAW AND THE BASIS OF FORMAL, DOGMATIC JURISPRUDENCE

Shortly before the outbreak of the 1848 revolution on the continent, Marx wrote: "In the bourgeoisie we have two phases to distinguish: that in which it constituted itself as a class under the regime of feudalism and absolute monarchy, and that in which, already constituted as a class, it overthrew feudalism and monarchy to make society into a bourgeois

society.”¹ Positivism then may be said to have emerged from the firmly established bourgeois society or, at any rate, from a society in which the bourgeoisie had succeeded in consolidating its economic and political gains to an adequate extent. In the preceding phase natural law occupied the prime place in the ideology of this bourgeoisie. Positivism appeared on the scene as the negation of this teaching. The theory that, besides the real state and positive law, there existed a far more rational and ideal state and law became superfluous the moment the bourgeois state and its legal system were declared to be that ultimate stage in history at which the natural-law principles had at last come into their own. As for the natural and inalienable rights of the individual, they, in the conditions of a qualifying state, were replaced by the category of subjective rights, interpreted as derivatives of law in the objective sense.

True, positivism as negation of rational law was not its immediate successor everywhere. Historically, it must be admitted, positivism was not everywhere the direct antipodal successor of the doctrine of natural law. In some countries where the advance of bourgeois ideology in its pure form encountered obstacles in the shape of the persisting feudal encumbrances—in Germany, for example—the historical school came upon the scene earlier.

Positivism was the reaction of the bourgeoisie to the natural-law doctrine, whereas the historical school, originally, was also a reaction to that doctrine, but the reaction of the feudal aristocracy, whose sole aim was to cling to its positions of power both in the society of the day and at the helm of state.

The Russian jurist Korkunov, in a commentary on the subject, referred to the “ease and speed with which the historical school overcame the natural-law theory”.² Actually, there was no such victory. A theory summoned into existence for the purpose of justifying and preserving an outmoded feudal system could not in the general course of political and legal thought overcome a theory that substantiated a

¹ K. Marx, *The Poverty of Philosophy*, Moscow, 1973, p. 150.

² N. M. Korkunov, *History of the Philosophy of Law*, 1908, p. 318 (in Russian).

new and more progressive social system. Naturally, in some countries—in Germany and Russia, for example—the historical school concepts managed for a time to gain official or semi-official recognition and thus elbowed out (particularly in the universities) the natural-law doctrine. But by no means could this be described as the triumph of one set of principles over another. Actually, both the natural-law and the historical school doctrines were supplanted by legal positivism—the theory of the bourgeoisie now busily consolidating their system and their power and buoyantly confident of the durable quality of its foundations.

In any case, the historical school itself slowly but surely began to align itself with positivism, adapting the “pandectical” aspect of its functions to the new and growing capitalism.³

Legal positivism replaced also the Hegelian doctrine of law (including its post-Hegelian variations). In a sense, the Hegelian philosophy of right could be regarded as an attempt to achieve a reconciliation of law as a purely rational category (in the natural-law sense) with law as a purely historical category in the historical-school sense. Hegel rehabilitated the philosophical interpretation of law as an abstract category, as development of the idea of law. At the same time, in Hegel history is the self-revelation of the spirit, and the spirit in its turn reveals itself only in the course of history. While the idea of law was passing through its stages of development and the rational was only on the verge of becoming real, Hegel’s teaching approximated in some degree to the natural-law theory. But as soon as the spirit revealed itself in history and everything that was real became rational, Hegel turned

³ In the 1920s, the Soviet jurist P. I. Stučka characterised the historical school (referring to its evolution) as a kind of reconciliation between the bourgeoisie and Junkerdom. The general theoretical propositions of the historical school were much to the liking of the Junkers—especially the bourgeois “pandect” aspect of its activity, its study of the received Roman law which constituted the juridical base of commodity production. And both one and the other (at least some groups of the bourgeoisie and the German Philistines) delighted in the idea of a national development of law which, though correct in itself, when transplanted to Prussian soil, rapidly acquired nationalistic overtones and culminated in the demand for a “truly German law”. (P. I. Stučka, *Introduction to the Theory of Civil Law*, Moscow, 1927, p. 11. in Russian.)

towards the historical school, although he himself criticised this school and its historicism much more profoundly and consistently than did the historicism of Savigny and his disciples. By saying that all that was real was rational, Hegel actually anticipated positivism which asserted that, once enacted, a law becomes rational, justified and removed once and for all from the realm of debate. So that which Hegel achieved with his philosophy of right was, knowingly or otherwise, the starting point for juridical positivism.

The book by K. Bergbohm, *Jurisprudenz und Rechtsphilosophie*, with its devastating criticism and rejection of natural law, is regarded almost as the Bible of German positivism. Reflecting the intellectual atmosphere of his time Bergbohm writes: "Law, which really functions as law is in itself free of contradictions and deficiencies, and provides the base of any system of relationships between people. Natural, rational or any other non-positive law is also complete in itself, but insofar as it is nothing more than an assumption, it is a source of mental confusion and if taken seriously as a legal system, leads directly to lawlessness and anarchy. Their correlation is as unlikely as, say, the correlation of objective reality and subjective fiction. A believer in natural law must reject positive law; he who is reluctant to reject positive law must reject natural law. From the standpoint of everyday juridical experience, a dualistic law teaching is ruled out."

Characteristically, Bergbohm dismisses (although less categorically) as metajuridical the positions of the historical school which, in his opinion (especially its spirit-of-the-people concept), are steeped in the natural-law approach. Bergbohm's biggest worry is that any scientific elaboration of law (even on a positivist basis) might well recreate conception of potentially ideal legal systems. These he describes as "theoretic law", and he rejects them almost as categorically as natural law. For him, the "essence of any law is its functioning. Consequently, no matter how beautiful the ideal law may be, it will not match even the most dreary positive law, just as any cripple sees, hears and acts better than the most beautiful statue."⁴

⁴ K. Bergbohm, *Jurisprudenz und Rechtsphilosophie*, Leipzig, 1892, S. 407, 436, 437.

It should not be assumed that the men of legal positivism were unaware of such propositions and categories as "feeling of law", "judge-made law", the "nature of things", and so on. Thoroughly acquainted with them they were, and they deliberately rejected them and not without detailed theoretical argumentation. Bergbohm himself, for example, was well to the fore in arguing the case against the "feeling of law".

We arrive, then, at a situation in which some legal experts simply throw natural law overboard. Others manage somehow first to bring it into line with positivism and, ultimately, to merge it completely. But in both cases the result is the reduction of law to a compilation of functioning norms and its being regarded as the perfect system, which, like any dogma, needs no substantiation other than the simple fact of its existence. And though juridical thought has centred on functioning law, it has come no nearer to realising that all such law is conditioned by social reality. The natural-law principles, although presented as the eternal categories of human reason, expressing the nature of man, had been in reality an ideologised refraction of the economic and political needs of an ascending new system. It was the thread which linked up, even if in a roundabout way, law and the world of reality. Now that thread was broken: "It is indeed among the professional politicians, the theorists of constitutional law and the experts in civil law that the connection with the economic facts is lost completely . . . constitutional law and civil law are treated as independent spheres, each having its own independent-historical development, each being capable of and needing a systematic presentation by the consistent elimination of all inner contradictions."⁵

Revolutionary reconstruction and radical social change have always had in the forefront the idea of social justice as the answer to the old, unjust legal order; subsequently, as these demands are realised—the extent to which they have been realised is another matter—the previous confrontation ends and the task of sanctifying the new order begins. In this sense, there is nothing special about the transition from the natural-law view of the revolutionary Enlightenment to positivism. The specific feature of bourgeois ideology was

⁵ K. Marx and F. Engels, *Selected Works*, Vol. 3, p. 371.

that, in a situation when the juridical outlook was still firmly in the saddle, positive law did not merely merge with what had formerly been called natural law; it became a fetish, an absolute, a dogma, not only independent in its self-development from the world of reality, but actually dictating its demands to the real world.

The rise and consolidation of capitalism and of its state system brought with them a rapid development of law and its codification, as well as new institutions and teachings. Capitalist trader imparted an impulse to legal practice and extended its range; this was due to the growth of contractual relationships and also to the accompanying conflicts involving business interests and necessitating legal actions. In this atmosphere there was a compelling need for a precise, formal-logical reassessment of the law as it stood, for its systemisation, for legislative know-how and interpretation of the basic juridical concepts and norms. Existing texts needed setting out in a more suitable form, in simpler terms. In other words the practical need for the logical elaboration and explanation of existing law, which had always accompanied its development, acquired a new quantity and quality. This practical need encouraged the tendency for bourgeois jurisprudence to take shape as a formalised and dogmatic science. And by virtue of its overall socio-political leanings and tendencies, it remained fixed in this groove for a long time without displaying the slightest desire to become anything else.

Thus it was that 19th-century juridical positivism provided the theoretical foundations for a formalised dogmatic jurisprudence. And since positive law comprised all reasonable and natural demands this new law needed no other premises for its study than positive law itself. Needing no social, economic, ethical or indeed any other kind of substantiation or explanation it constituted a system from which one could logically deduce everything needed for theory and practice. There is a rule according to which, the judge cannot refuse to deliver judgement on the grounds that the case is not covered by the law (for instance, Article 4 of the French Code Civil provides for legal action being taken against the judge in the event of failure to do so). Hence, the judge is obliged to assume that the answer to any legal

question that may confront him can and must be found in the existing law. Positivist methodology transferred this situation mechanically to the legal scientist and science in general. However, between the statement that adequate to application of the law is the law itself, and the statement that the only thing needed for the study of the law is law itself, there is an important difference. Whereas the first provides a correct guide to the functioning of the courts, the second disorganises the study of law, narrows its horizons, restricts the scope of its activity to formal-logical research without regard for the economic, political and other metajuridical aspects of law.

The mistake of positivism was not in its stressing the significance of the formal-logic method of legal science, it was that the method itself was exaggerated and turned into a formal dogma. The potential of legal science now rested with formal-logic methods regardless of the fact that the usefulness of their application depends on the degree of dialectical understanding of how law operates and is socially conditioned, of the social implications of its basic principles and institutions. In passing, we might add that dogmatism in science in the shape of a rigid adherence to earlier formulated theses and without any critical reappraisal, of thinking in terms of long-established formulae in total disregard for the social dynamic in juridical science, is specifically expressed in the prevalence of "commentator" methods in the study of law.

The Polish researchers Opalek and Wroblewski have defined positivism as the theoretical summarising of the formal-dogmatic method.⁶ According to K. Polak, an East German jurist, this particular method is a consequence of the bourgeois-positivistic (i.e., juridical) outlook.⁷ Certainly the two propositions are not mutually exclusive. Positivism exaggerates the importance of the formal-logic method by interpreting the science of law as a formal dogmatic jurisprudence. Actually, this exaggeration can be traced directly to the juridical outlook and the general ideological postulates of the now triumphant bourgeoisie.

⁶ *Panstwo i prawo* No. 1, 1954.

⁷ K. Polak, *Zur Dialektik in der Staatslehre*, Berlin, 1963, S. 201.

As with any other system, law has its own complex system of internal connections: the structural, indicative of the interacting components of the system, the genetical, indicative of a phase-by-phase transition without overstepping the boundaries of the system and, lastly, the regional, which determine the unity and divergence of particular forms, again within the circumscribed limits of the system. Obviously, the formal-logic method cannot help very much in any investigation of the genetical and regional associations. It is even less applicable to the external connections—the causal connections, that is, those that reveal the conditionality of the given system and finally, the functional—those which indicate the effectiveness of its influence on its surroundings. The formal-logical method can be effective only if it studies these internal connections of the system, its basic concepts, and produces clear legal definitions, and even then it is not all-powerful.

It follows that juridical positivism greatly restricts the range of studies and the options available to juridical science, notwithstanding its success in accumulating a fund of conceptual knowledge, in elaborating practically applicable juridical constructions and in improving legislative techniques.

The obvious scientific restrictedness of the positivist approach, the deliberate erection of a barrier by theoretical thought, were compensated for, in the opinion of its proponents, by its external resemblance to the methods of the natural sciences—to the strict classifications of biology, botany and chemistry. As distinct from the metaphysics of natural law, legal practice was now firmly established on the "solid ground of practice". As with the botanist, or any other natural scientist who deals with nature in its perfect forms, the jurist was not in possession of an equally perfect system of law which he, like the natural scientist, had only to describe and explain in its own terms.

Even the largely descriptive study of current law is in itself an involved matter calling for induction and deduction, analysis and synthesis, and other methods of scientific thinking. Hence the later bourgeois critique of positivist jurisprudence was at fault when, having gone to the other extreme, it announced that jurisprudence could not lay claim to

be scientific, that it was rather a technique or a craft, because its studies of current law hardly differed from the everyday functions of the practitioners of law.

L. Petrazycki, whom we have already quoted, and whose theoretical views differed substantially from the positivistic postulates, said, in a reference to the point we have just been discussing, that positivist jurisprudence merited a far higher rating than that of craft, or even an art, because it has to do not with concrete situations but with general categories and concepts likely to have a considerable bearing on any number of future situations.⁸ If in evaluating dogmatic jurisprudence we approach it from the historical standpoint, we see that it was a necessary phase in the development of bourgeois law and should be regarded as such.

Positivist jurisprudence, however, is no more than a descriptive science, a discipline of the lowest theoretical order. Viewed from the social aspect, it stands out as an apologia for capitalism. The legislation of capitalism's founding fathers which gave the green light for a ruthless exploitation of labour and an orgy of profit-making, was full of reservations and qualifications redounding to the benefit of the ruling class and harsh penal sanctions. It incurred no fundamental criticism and was greatly admired.⁹

⁸ Petrazycki also held that legal practitioners were subjected to considerable pressure from private interests and the powers-that-be generally, whereas jurisprudence, "relying on its reputation as a science, and able to engage in disinterested objective undertakings regardless of persons or their financial, political and other interests . . . restricts to the barest minimum the scope for differing viewpoints. Hence the justification for, and the lofty mission of, positivist-legal dogmatic jurisprudence" (L. Petrazycki, *The Theory of Law and the State in Connection with the Theory of Morality*, St. Petersburg, Vol. 1, 1907, pp. 225-26, in Russian). If we leave aside the point about the "disinterested" attitude displayed by bourgeois studies, and also the point about the neutrality of law, one could say that on the whole Petrazycki is on fairly solid ground in saying that the science of law to a greater extent than legal practice expresses the common position and interests of the bourgeois class as a whole.

⁹ J. Bonnecase, who has written several works on the French positivist school of exegists, comments: "The Code Civil evoked among French lawyers an admiration that knew no bounds; interpretation of it absorbed all their energies and was based on wholehearted respect for the texts; they enthusiastically lent themselves to giving it precise and exact definition; but to criticism of it—never. In those very rare cases when someone was bold enough to query particular formulations, the queries were couched

The real socio-economic relationships were, to put it mildly, inadequately reflected in bourgeois law. The law governing property and labour contracts as set forth, for example, in the Code Napoléon [paras. 504 and 1780] is far from expressing the actual meaning of the capitalist-property relationships providing for appropriation of the unpaid labour of others. In positivism and the law the abysmal conditions prevailing in early capitalist society are given a gloss and made to appear much more respectable than the social reality. The formal-dogmatic method becomes, as we have seen, a legal fetish. Another feature of bourgeois law was its uneven coverage of the various spheres of social relationships. To the wage-labour contracts, which, thanks largely to the struggles waged by the working people, were destined to become a major part of the labour laws, the Code Napoléon devoted a mere two articles, whereas wills and testamentary matters alone (to say nothing of inheritance generally) qualified for a total of 119 articles. The German Civil Code, however, honoured wage-labour agreements with 20 clauses (a figure which, compared with the paucity in the French Code, was in itself indicative of the changed times); bills of exchange, however, qualified for a solid 100 clauses. Clearly, class interest, and class interest alone, provides the explanation for these disproportions; the capitalists as a class have an impelling interest in the most careful and detailed regulation of their own particular relationships which contrasts with their maximum disregard and virtual *diktat* where working-class matters are concerned. These disproportions find striking expression in the range of subjects covered by positivist jurisprudence.

Of all the external factors exerting an influence on the law, positivism saw and recognised one only, namely, the state, the sovereign political power and legislator. Conscious of the need to provide a criterion that would enable it to separate law from ethics and other social norms, it saw the remedy in state sanction, in the sovereign power upholding law. The man who, perhaps more than any other, never tired

in terms so timid that the critical spirit seemed to have vanished completely." (J. Bonnecase, *La pensée juridique française de 1804 à l'heure présente*, Vol. 1, Bordeaux, 1933. p. 355.)

of stressing the association between the law and the sovereign power was John Austin, a leader of the British analytical school. The state, as the power behind the law, was visualised by positivism in more or less symbolical terms. This was because the concept "sovereign" tended to merge with the concept "head-of-state" and had never been clearly and precisely defined in a political-sociological sense.

From its understanding of law as the expression of the "will of state", positivism also drew some useful conclusions, underlining the supremacy of the law and the judge's subordination to it. Primitive though it was in its methodological postulates, which reduced the science of law to a descriptive discipline, positivism, by expressing the confidence of the bourgeoisie in the solidity and perfection of the capitalist system and thus emerging as the doctrine of law and order and political stability, did more towards establishing and cultivating the principle of legality than many of the later trends in bourgeois political and legal ideology.

True, while it underlined the significance of supremacy of law and subordination of the judiciary to the law, positivism betrayed a distinct tendency to formalise this principle. As expounded by the positivistic jurist, the law was a long, long way from being that full-blooded concept, rich in material socio-political content, that it had been for the men of the Enlightenment and, by the same token, the juridical-positivist concept of subjective law was also a long remove from the inalienable natural rights of man and citizen. The principle that the judge is subordinate to the law often took the form of a simple logical syllogism with law as the major premise, the factual data the minor and the decision as the inference (similarly in logic: Mill, Zigwart and others).

Generally speaking, no harm is done by setting forth the passing of legal judgement in the shape of a syllogism; it is a specific description of the actual development of a given social relationship, reached by logical reasoning. Subsequent claims made by spokesmen of other schools, especially the realists, that they had found a way round the syllogism, proved to be untenable, since their substitution for law of "judicial intuition", "judicial psychology" and other criteria (the philosophy of law proposed the "law idea", "legal values", etc.) did not invalidate the syllogism as such, but

merely altered the major premise.¹⁰ The negative aspect of positivism's use of the "syllogism theory" comes out in its effort to put in second place, or even throw out altogether, the socio-class content of the functions of the bourgeois court. It was a way of formalising the highly contradictory process of bourgeois justice, a process in which the real class nature of bourgeois law and of its legal system are laid bare in specific cases. The logical form of the syllogism, however, as applied to legal procedure, was never such a barrier that it had to be thrown overboard in order to demonstrate the social content of legal procedure and its connection with politics, ideology and social psychology.

All the negative aspects in this formalisation of law, typical of positivism, were clearly displayed in its failure to formulate its attitude to the legal norm (that is, law in the broad sense), in its refusal to use economic, political, ethical or, indeed, any criteria to answer the question: is this a just or an unjust law, is it moral or amoral, good or bad? For positivism the only thing that mattered was the effectiveness of law in the purely juridical sense. The source of this attitude that failed to put a value on the law was the presumption that bourgeois law was just and perfect, that is, it was the result of the high evaluation that a complacent bourgeoisie bestowed on its law. As time went on, this attitude turned into a methodological principle according to which the function of science was only to investigate and not to evaluate or make demands. Naturally, positivist writers did not rule out the possibility of the justice of the law being questioned, but they were always quick to point out that such questioning was of little practical interest and belonged more to the metaphysical sphere than to the juridical.

It was the positivist rejection of any social evaluation of the law that discredited the phrase "law is law" as symbolising something formally correct but, in effect, outrageous and utterly unjust. This kind of formalism paved the way to legal voluntarism and arbitrariness. Positivism had nothing to say about the problem of formal use of the law to

¹⁰ On this score Holmes wittily observed: "The unexpressed major premise is the judge himself." See I. D. Levin, "Law and Logic", *Izvestia AN SSSR*, Department of Economy and Law, No. 1-2, 1944, p. 20.

violate the principles evolved by mankind in the course of historical development, about the habit of authorities to issue decrees which the famous Russian historian Klyuchevsky characterised as having only "the appearance of law".¹¹ Incidentally, the problem of "lawlessness" finding its legislators had been noted in social thought long before positivism appeared on the scene.¹²

From the standpoint of the classical juridical-positivist thought, "legislative arbitrariness" and "law-violating legislation" were internally and logically contradictory. In this respect, the well-known positivistic division of law in the material sense and law in the formal sense changed nothing, because in neither case are there any criteria relating to the legislative activity of the state that go beyond the purely legal framework.

As previously mentioned, positivism helped to establish and develop the principle of legality. Its insistence that law should be strictly and consistently observed by all, including the state authority, was undoubtedly progressive. But if from our understanding of legality in the strict sense we turn to its broader interpretation as a legal form cementing the pillars of democracy, we see that the positivistic approach is sadly inadequate.

2. THE DECLINE OF POSITIVISM AND ITS TENACITY

The twilight of positivism as the predominant theory of law set in as the 19th century drew to its close. The main reasons for its decline can be traced back to the factors already mentioned in explaining the fall from grace of the juridical outlook. The development of the class struggle of the proletariat in every field—economic, political and theoretic—exposed the ideological weakness of the doctrine, which proclaimed the perfection of bourgeois law. Even at the purely practical level, positivism proved to be incapable of doing what the rising monopoly capitalism expected from it. "The scientific stock at the disposal of juridical positiv-

¹¹ Klyuchevsky, *Letters, Diaries, Aphorisms and Thoughts on History*, Moscow, 1968, p. 377 (in Russian).

¹² Marx/Engels, *Ŭerke*, Bd. 13, S. 444.

ism was no longer adequate; who would be satisfied with the concept of 'law without problems' when problems were encountered at every step? Of what value was the traditional method of legal interpretation in the shape of the so-called juridical 'hermeneutics' which, in the words of G. Radbruch, was merely a 'doctrine of how to convey the impression that one was really interpreting the law when, in point of fact, one was actually making it?'¹³

Evidence that positivism was in a state of decline was to be found in the fact that it has already displayed a tendency to become a "jurisprudence of concepts", failing to distinguish between the really necessary elaboration of law by the methods of formal logic and a mere abstract rationalisation, between working constructions and abstract theory-spinning, between elaboration of essential concepts and playing with concepts.

The positivist Rohen, for example, expressed the view that law should be a kind of a herbarium where, in addition to the ordinary plant stock, there should be those envisaged in imagination and bred according to the rules of botany. Obviously, such an enthusiasm for abstract logical constructs of the juridical concept was bound to clash with the inner logic of the growth of scientific knowledge.

However, despite the unmistakable decline of legal positivism and the barrage of criticism to which it was subjected by the bourgeois philosophy and sociology of law (we shall return to this criticism later), it is still with us, admittedly somewhat refashioned, but functioning as one of the major trends in theoretical-legal thought. Recall, for example, Kelsen's "pure theory of law" and the "analytical jurisprudence" in Britain and the United States; other active champions of positivism include Ripert, Walin, Bobbio, Ermakora, Virally, Scarpelli, and English.¹⁴ According to M. Virally, "there can be no doubt

¹³ B. Manelis, "The Free-Law School and Its Place in Bourgeois Juridical Science", *Vestnik Kommunisticheskoi Akademii* No. 28 (4), 1928, p. 213.

¹⁴ Back in the 1920s, Baumgarten noted that while the positivist camp was not lacking in supporters, its output in terms of methodological work had declined and looked more primitive than the work turned out by the possibly less numerous "modernistic" trend. (A. Baumgarten, *Die Wissenschaft vom Recht und ihre Methode*, Tübingen, 1922, S. 601.)

that the most representative school, at any rate in France, is juridical positivism".¹⁵ In Virally's view, we have to thank juridical positivism for making law a science. He follows this with the point that "if one wishes to reduce the science of law merely to establishing causal connections then, of course, this is something that legal science cannot claim to do".¹⁶

It would seem, then, that law is to be regarded as a science only when it relinquishes the study of causal connections, that is, the socio-economic and the class-political factors in relation to which law appears as a consequence, and also of those social consequences and results in relation to which it is the cause. Whereas in the last century approaches of this nature were grounded in botany, geology and zoology, nowadays Virally, in keeping with the spirit of the times, shows a preference for physics in the neo-positivist interpretation of the subject, that is to say, in keeping with the rule that the "unobserved object does not exist".

What is the explanation for this remarkable tenacity displayed by positivism?

The problem of the social nature of law and of its essence has always been something of a headache for bourgeois jurisprudence. It is here that its methodological and socio-political limitations stand out most clearly. The positivist interpretation made it possible to do away with this tricky question, and on allegedly scientific grounds, presenting its repudiation as a move away from abstract philosophical speculation and useless gropings for "hidden structures" towards strict experimental analysis of law as the "given" and the "real". Both in law and in philosophy, positivism claims that it has overcome the extremes of idealism and materialism ("the third way").

Another and not unimportant reason for the tenacity lies in the everyday functioning of a highly ramified jurisprudence in which, as in the past, methods of logical investigation play a big part. While some of the more "advanced" schools may indulge in the luxury of an anti-positivism *in excelcis*, bourgeois jurisprudence, on the whole, shies away from even

¹⁵ M. Virally, *La pensée juridique* Paris, 1961, p. 5.

¹⁶ *Ibid.*, p. 10.

the slightest attempt to bring discredit on what is, after all, its own base. The various branches of jurisprudence, while not indifferent to the winds of change, have owing to their immediate practical orientation constantly fallen back on juridical dogmatics and have no intention of breaking with it, all the more so because the ever-increasing complexity of the technical-economic, the political-economic and the social conditions in which capitalism finds itself further increases the complexity of the legal system, leading to the multiplication of legislative and regulative acts, to binding precedents, in effect, to an enormous proliferation of the normative materials awaiting elementary scientific assessment. Here we have one of the reasons for the ceaseless recurrence of the methodological postulates of positivism.

And, lastly, to the factors favouring the preservation of positivistic thinking in bourgeois law theory, especially at a time when a reaction against positivism has set in, there must be added the influence exerted by the philosophy of neo-positivism or, as it is sometimes described, logical positivism, and also the intensive cultivation of new branches of logic.

But before dealing with some of the current juridical-theoretic concepts with positivistic leanings we must take a look at the bourgeois criticism of positivism, which is highly relevant to an understanding of the evolution of bourgeois legal ideology and of its fundamental features.

3. THE CRITIQUE OF POSITIVISM IN BOURGEOIS LEGAL SCIENCE. A FALSE ALTERNATIVE

Two periods can be singled out when positivism and its role in bourgeois legal science were subjected to severe and, at times, noisy criticism. The first came at the turn of the century; the second period relates to the decade immediately following the defeat of nazi Germany.

The criticism levelled against positivism by the "autonomous law movement" and other sociologically oriented schools in the first of the two periods could be described as a kind of revenge-taking; for in its heyday positivism had not been at all backward in using its heavy artillery against all who ventured outside the formal-dogmatic framework of legal

studies and posed new problems. In the first phase of the encounter, spokesmen of these schools were fairly adventurous in criticising the "jurisprudence of concepts", which had reached the extreme in formal-logic constructs. But there the criticism ended because the sociological schools themselves had taken over for their own purposes many of the postulates of positivism with the result that the "reputation of positivism" was achieved elsewhere. The "elsewhere" turned out to be, ultimately, the judge-law relationship. The entire weight of the critique of positivism was thrown into refuting the positivist thesis concerning the binding effect of the law on the judge. Thus the criticism levelled against positivism was on a point that least needed "refuting".

In the second phase, criticism of the methodological base of positivism never got off ground. More than that, due to "integrational" tendencies, the opposition made an about-turn in the direction of tolerance. True, the positivist view on the role of the judge came in for some criticism. But it was now little more than an echo of the past, since recognition of the judge's role in law-making was now common ground in bourgeois law theory as a whole. The challenge, however, was to the positivist view of the law-state relationship, a view of law as the product of the sovereign state authority. In the spirit of the primacy-of-law idea, positivism now came under fire for its alleged *etatism*; and this was only the first step towards a situation in which charges of *etatism* and totalitarianism would be levelled against any doctrine proclaiming the interconnection between state and law, the main target, of course, being Marxism. In the first phase of the "refuting positivism" campaign the main burden was borne by sociological jurisprudence; in the next phase it was taken over by the "revived natural-law" movement.

In this phase of the critique of positivism the most vulnerable target was chosen, namely its wholesale rejection of any social criteria from which one could deduce a social evaluation of the norms and institutions of the law then in force. Positivism was rebuked, and rightly so, on the grounds that from its standpoint it was impossible to disqualify nazi legislation which, as everybody knows, simply trampled underfoot the elementary principles of humanity, morality and democracy. With the destruction of the nazi regime, this de-

fect of juridical positivism was plain for all to see. It acquired a practical aspect at the time of the Nuremberg trial of the nazi war criminals, when the International Court condemned laws that ran counter to the principles of humanity, the men who framed these laws and even some of those who carried them out, judges included.¹⁷

For the first time in history, juridical assent confirmed the groundlessness of the plea that any law, however atrocious, had to be obeyed if formally it had legal sanction. This decision, which contradicted the positivist conception, underlined the narrowness and formalism of the purely positivist approach to law, with its rejection of social evaluation ending in its justifying deeply reactionary tendencies and amorality in legislation.

Having found the chink in the positivist armour, its critics were quick to point out that this was the logical outcome of its solution to the problem of the law-state relationship, namely, its view of law as the product of the will of the state. Professor N. Bobbio, the Italian jurist, referring to bourgeois law theory after the Second World War, makes this point: "While one of the consequences of legal positivism had been the reduction of law to state law or, as may be said, the monistic conception of law, it is certain that the totalitarian state must be regarded as the culmination of positivism. Both in Italy and in Germany, there were not lacking those who ascribed to legal positivism, which had given the state the monopoly of law-making, a heavy responsibility for totalitarianism. . . . There were some who even considered the totalitarian state as the natural consequence of legal positivism."¹⁸

The key question here is: How close was the relationship between fascism and positivism? "The nazi political-legal

¹⁷ In the case of Franz Schlegelberger and other nazi lawyers, heard before an American Military Tribunal in 1948, four of the accused were sentenced to imprisonment for life, four received ten-year sentences, one seven years and another five years. By 1950, however, all ten had been set free. The case provided the background to Stanley Kramer's film—*The Nuremberg Trial*. But the actual course of the trial differed considerably from the screen version, particularly in regard to the psychological make-up of the chief defendant.

¹⁸ N. Bobbio in *The American Journal of Comparative Law* No. 3, 1959, p. 332.

ideology can be described as the last of the death-bearing fruit plucked from the already defunct tree of 19th century positivism," said the West German law expert von Hippel.¹⁹ Similar statements could be cited by the dozen, since positivism's share in the responsibility for fascism was the subject of considerable comment in the bourgeois legal literature of the 1950s, and especially in West Germany.²⁰

The actual picture, however, based on concrete, historical data, is quite different. The ideology of fascism originated as a conglomerate of reactionary ideas, including the bourgeois law theories elaborated in the first quarter of the 20th century—solidarism, neo-Hegelianism, "corporativism", and those teachings which regarded law as a social function. Positivism, however, is not among them. And, what is more, most of the theories in this rag-bag of reactionary ideas had themselves proclaimed to be "refuting positivism".

For its part, the nazi ideology fiercely and demagogically denounced positivism as the product of a despised liberalism, as the very antithesis of German legal thought. Positivism, according to the nazi lawyers, was a barrier in the way of "a genuinely Germanic law". Overcoming positivism as a factor "hindering the renewal of the true German legal life",²¹ was one of the constantly reiterated demands of the official nazi ideology.

Some twenty years before von Hippel denounced nazi legal thought as the last fruit of positivism, one of the spokesmen of the nazi legal front, N. Nicolai, declared that the ultimate consequence of positivism had been the rejection by the liberal democratic state of 1918 (the Weimar Republic) of the idea of law, which Nicolai understood as the racial essence of law.²²

A jurisprudence grounded in positivism was, according to Nicolai, the regrettable outcome of relinquishing the idea of race, hence, in order to overcome positivism, the essential thing was to turn the dualistic liberal state into a totalitarian

¹⁹ Quoted from *Staat und Recht* No. 6, 1954, S. 802.

²⁰ One of the first to advance this theory was G. Radbruch (see *Vorschule der Rechtsphilosophie*, Göttingen, 1965, S. 113).

²¹ K. Larenz, *Deutsche Rechtserneuerung und Rechtsphilosophie*, Tübingen, 1934.

²² N. Nicolai, *Rasse und Recht*, Berlin, 1933, S. 44.

state and secure a reversion of the German legal system to the idea of race.²³

Another top-ranking nazi lawyer, C. Schmitt, "imperial head" of the Reich law faculties, likewise expressed the view that positivism as an historically-evolved legal system was now, in the new conditions of the fascist state, both alien and harmful. "In the Germany of today," this gentleman observed, "it is now perfectly clear that positivism has had its time."²⁴ In Schmitt's view, positivism adhered to the 19th-century dualistic conception of the state and civil society, whereas "National Socialism" had put an end to any such dualism; its state was no longer divided into state and society, but formed a trinity of three integrated structures: the state, the nazi movement, and the people. In these new conditions, positivism became superfluous, and Schmitt expressed his delight that now in all branches of law, including criminal law, the positivistic thinking in terms of norms and acts was on the way out.²⁵

There can be no doubt whatever that for men like Nicolai and Schmitt, and indeed for all the nazi legal experts, positivism and liberalism were twins and, as such, the antithesis of the totalitarian fascist state. E. Topitsch, a contemporary Western writer on law, in a foreword to a collection of articles by Kelsen, makes the point, and with every justification, that whereas in those days, in preparation for and during the rule of the totalitarian state and, later, after its establishment, positivism was execrated as an ally of the liberal-humanist democracy, nowadays metaphysics is seen as the true sanctuary of democracy, while positivism is constantly condemned as a collaborator of the totalitarian state.²⁶

²³ N. Nicolai, *op. cit.*, S. 48.

²⁴ C. Schmitt, *Über die drei Arten des rechtswissenschaftlichen Denkens*, Hamburg, 1934, S. 58.

²⁵ *Ibid.*, S. 65-67. With the rejection of the juridical teaching on the state (and this was the most complete expression of positivism in the science of state law), its place was taken by the so-called integrational concept evolved by R. Smenda, which also played an important part in providing theoretical substantiation for the totalitarian state.

²⁶ H. Kelsen, *Aufsätze zur Ideologiekritik*, 1964, S. 26. A similar view is expressed by the Italian jurist N. Baratta who, while rightly blaming fascism for its "authoritarian degeneration of the legal system", points

Speculating with the *Rechtsstaat* idea, the nazi ideology opposed this concept to the liberal-positivist notion of state-made law. In the nazi view, the *Rechtsstaat* had nothing whatever to do with the idea of the state being bound by the rule of law. The nazi Reich, it was said, was a state that functioned in accordance with law, but law, in the nazi concept, was identical with strength and race. Addressing the German Academy of Law in 1934, Herr Frank, head of the nazi legal front, set forth the aims and the principles of the National-Socialist *Rechtsstaat* as unitarism, racial purity, purity of blood and heritage, protection of German soil and its farmers, the single party and the Leader. In this enumeration there is not the slightest mention of the rule of law and the other legal principles of positivism.

For that matter, it would be difficult to find a single "positivistic principle" in the functioning of the nazi state administration. Positivism, which stood on the shoulders of the juridical outlook, was based on the rule of law, whereas the fascist dictatorship, typifying the capitalist swing from democracy to reaction, relied chiefly on the unlawful methods of domination (unrestrained terror, physical destruction of the opposition, the omnipotence of the secret police, etc.). The Weimar Constitution was trampled underfoot. The Führer's every whim, no matter how barbarous and insane, replaced law, in fact it became the law. There were no guarantees of legality whatever. Nor were there any guarantees in the activity of the courts, which were now guided solely by official criteria, that granted wide power of discretion to the judge, and especially, by such criteria as a healthy national instinct (hotch-potch of "race law", "national spirit" and "intuition-al free law"). Herr Schmitt, mentioned above, categorically rejected what he described as the "fiction of the judge being guided by norms and practice" and insisted on subordination of justice to the Leader principle.²⁷

out that the ideological sources of the degeneration were at a fair remove from positivism (*ARSP* No. 3, 1968, pp. 327-28).

²⁷ In the post-war years Schmitt, despite his fascist background, functioned first as one of Adenauer's legal advisers and subsequently as adviser to Kiesinger during their respective Chancellorships. For details see: *Extraordinary Legislation in the FRG*, Moscow, 1970, pp. 250 ff (in Russian); R. Meister, "Mittler faschistischen Staatsdenkens Carl Schmitt", *Staat und Recht* No. 6, 1967.

Positivist ideas did indeed find widespread application in the post-war Federal Republic, when the judicial bodies of the Bonn administration were faced with the task of rehabilitating the ex-nazi chieftains and war criminals who, despite all the evasive action, had nevertheless come within the sphere of their adjudication. Now great play was made with the idea that the accused had merely adhered to the letter of the law, and that "law is law", irrespective of its content and any subsequent political-moral evaluation. During the hearings of the nazi war crimes the judges in Bonn, "forgetful" of the moral principles and human values involved, clung limpet-like to profoundly positivistic criteria.

Only those who remain blind to the real socio-political causes of fascism and content themselves with superficial analogies, or who deliberately try to divert attention from the actual causes, from the factors which ultimately brought fascism to the helm of state—only those who think along these lines could declare that the nazi ideology and the elements determining the nature of its statehood had their origins in juridical positivism. It is quite another matter that positivism, as was the case with so many other trends in bourgeois political-legal thought, failed to produce the ideological postulates that might have provided a serious obstacle to the rise of fascism.

Equally unconvincing are the theoretical constructs of an anti-positivist nature which see the main reason for positivism's failure to distinguish just law from unjust law, and even criminal and immoral law, in its acknowledgement of the close link between law and state, in its granting to the latter a monopoly of law-making. It should be affirmed, however, that in declaring this fact positivism was correct. In our own times denial of the part played by the state in establishing and developing positive law looks even more anti-historical than it did in the 19th century. Where positivism really did go wrong was not in its seeing the connection between law and state, nor in its emphasis on the law-making role of the state; its error, in our view, lay in its general methodological positions of a strictly formalist nature which ruled out the possibility of social evaluation of the law-making activity of the state. The objective criteria required for evaluative purposes could be obtained only by examination of the law-making

functions of the state, and also the interconnection between law and state as a whole, in the sense of their being conditioned by the economic base of society, its political structure and level of democracy, by the class movements in society and the political duel between the conflicting forces of reaction and progress. Alas, from all these fundamental aspects of the everyday life of society, positivism was as remote as remote could be.

Nowadays its critics attack it from a different angle; history, they maintain, teaches that the state may enact legislation in breach of the law, consequently, to make sure that this does not take place, the state should be deprived of its monopoly of law-making, and then all will be well. Thus, by a single stroke of the pen, an important regularity in the functioning of the normal political-legal superstructure is obliterated and, with it, also the very real matter of the relationship between justice, legality and democracy is replaced with the Alice in Wonderland problem of "destating" law. And to whom will the devisers of these schemes hand over the law-making monopoly hitherto invested in the state? The inheritor, evidently, will be the judge, which presupposes replacing "state-made law" by "judge-made law". We shall ignore for the moment the uncorrectness of the premise that the court can be counterposed to the state. The point here is a confrontation of judicial decision with law-making. But then the annals of capitalist society are rich in instances of precedent and judicial practice achieving exactly the same ends as law-violating legislation. Were not slavery and the slave trade "legalised" by the courts and judge-made law? And the same goes for discrimination on grounds of sex and race. As late as the 1950s in the United States, the Communist Party was ostracised by means of legislative action; in West Germany the Communist Party, in violation of the law, was for long under ban, effected chiefly through action in the courts.

Of course, there is a certain attraction in the formula that a court has the right to refuse to apply a law that is contrary to human rights and morality. We would naturally pay tribute to judges if they refused to follow the terrorist laws of the fascist regime. Nevertheless, this solution would, if accepted, open the floodgates to arbitrary action by the courts. By advancing the alternative—judge or law—bourgeois legal

thinking finds itself trapped between the Scylla of terrorist legislation and the Charybdis of the arbitrary judgement. The second is no less fearsome than the first. To try to get round the issue of law-violating legislation, by shifting the responsibility from the law to the courts, is a dangerous undertaking, because in capitalist countries today the judiciary is, as a rule, less amenable to democratic influence than the legislative authority.

The positivist approach obliges the legislator to act in compliance with the articles of the Constitution. He may do so in the most formal manner, but shirk his constitutional duty he cannot. The higher the level of bourgeois democratic constitutionalism, the more frequently will the law-violating legislation find itself at loggerheads with the constitutional principles and norms and, consequently, become suspect even from the standpoint of formalistic positivism. But in the bourgeois anti-positivist scheme of things, the judge with the ample supra-law natural-law criteria at his disposal (they are suitably vague) turns out to be above the Constitution. Indeed, the loopholes in this approach for getting away with law-violating legislation and for unconstitutional encroachment on the democratic principles of the law are much more numerous and dangerous than in the positivist approach.

As we see, the matter of "non-law" finding its legislators is not resolved by transferring the centre of gravity from one particular area of the legal superstructure to another or by change of emphasis in the actual sources of law. This, far from being a purely juridical matter, is a socio-political problem.

While noting the vulnerable spots in the bourgeois critique of positivism, the weakness of its "judge or law" alternative and indeed the whole idea of "destating" law, one must remember that the positivist formal approach to the subject with its disavowal of social criteria is every bit as dangerous now as it was in the past. It would be utterly wrong to imagine that the matter of law-violating legislation disappeared from the political scene with the collapse of the fascist states. It is the inevitable accompaniment of the kind of swaying from democracy to reaction that is typical of monopoly capitalism.

Almost immediately after the military-political débâcle suffered by fascism in the Second World War, "anti-communism" and "cold war" propaganda became the war cries of the socialism-fearing reactionaries. The inherent tendency of monopoly capital to part company with democracy in favour of political reaction is still making itself felt, but this time in a considerably modified form. The immediate purpose of the current dislike shown for democracy in the big monopoly groupings in the main Western countries is not a forthright rejection of republican-democratic regimes and methods of rule; outwardly these are retained, but everything is done to remove the political backbone from those institutions which, if used by the representatives of the working people, could place the rule of big capital in jeopardy. The target chosen by the big bourgeoisie in the particular circumstances prevailing in some countries is in the sphere of the democratic rights of the people and their organisations; elsewhere, electoral-law manipulation and parliament come in for treatment designed to take the sting out of the opposition and to render it as harmless as possible.

Fully aware that the psychological climate nowadays is not conducive to action of this nature, the emasculation of democracy is pursued wherever possible through legal channels, with due respect, of course, to juridical procedure, observing the while all the niceties. It is this aspect of what is really law-violating legislation that invests the problem with the utmost seriousness,²⁸ in addition to acts which are unconstitutional and in violation of particular norms, there may be others which it would be difficult to dispute from the formal-juridical standpoint and yet which are in violation of the rights and freedoms of citizens and organisations stemming from the level of democracy historically achieved by society.

At one time the very fact of the establishment of law as the chief means of regulating public life was a quite definite indication of progress. Legal regulation acts as a counter to arbitrary action, particularism and uncertainty in social re-

²⁸ This view of the subject was stated by O. V. Kuusinen in his *The Communist Parties of Western Europe in the Van of the Struggle for Democratic Rights*, Moscow, 1954, p. 17 (in Russian).

lationships. But what could be considered progress for earlier times, say, at the dawn of capitalist society, obviously stand in need of revision to meet the new requirements of today. Law is not immutable and is always confronted by new demands. This is why the current positivistic interpretation of law as normative regulation having its origins in the capitalist state, needs overhauling. The need for social criteria of law to emphasise its connection with the social progress and the level of democracy won by the people, is indeed urgent. "A firm rebuff must be administered to any attempt and any legislation by reaction designed to nullify the democratic rights and freedoms won in the course of hard class battles."²⁹

This is achieved not by counterposing the law and the state, but by establishing criteria relating to the law-creating functions of the state, the democratic procedures of this law-making and its effective democratic control.

4. MARXISM AND POSITIVISM

A favourite ploy of the bourgeois law theorists in the duel with Marxism is to incorporate the Marxist teaching on law with that of their own schools and trends. If one traces all the incorporations of this kind in Western legal writings, the resulting picture is a curious one to say the least; the Marxist teaching turns out to be a variation of all the major bourgeois schools—natural law (Kelsen and Stumph); sociological jurisprudence (Kelsen); the historical school (Ross and Jeger); jurisprudence of interests (Fechner); naturalist-organic concepts (Burdeau), and so on. A point worth noting is that most Western experts identify the Marxist view precisely with those bourgeois schools of which they themselves are most critical. So that all the criticism levelled against that particular school redounds, *mutatis mutandis*, upon Marxism.

By far the greatest effort is expended in depicting Marxism as one of the variations of positivism. In this connection the attempt to establish a link between positivism and fascism

²⁹ *International Meeting of Communist and Workers' Parties, Moscow, 1969, Prague, 1969, p. 35.*

is quite often part of a long-range plan of provocation. Positivism is subsequently depicted as a feature of the collective totalitarian-state concept, which present-day anti-communism is constantly using.

Obviously, if one takes propositions out of context, it is the easiest thing in the world to make superficial analogies of all kinds. For example, positivism's point of departure is supremacy of law, subordination of the judge to law: both these principles are upheld also by Marxist theory. Positivism regards the law as the most perfect legal form, and Marxism assigns to it the basic role in the system of sources of law. Seizing on this analogy, R. David, asserts that law as "conceived in the USSR and the various people's democracies, can hardly claim to be wholly original. Being mainly the product of the labours of Karl Marx and Vladimir Ilyich Lenin, both of whom matured as jurists in countries belonging to the Romano-Germanic legal family, this concept is associated with the trend of juridical positivism, predominant in the 19th century and still significant in the 20th, which regards law as expressing the will of the legislator".³⁰ This, however, is no proof of any kinship between Marxism and positivism. Instances of the reflection and substantiation in differing ideologies of one and the same aspects of social evolution are numerous and this is one of them. In point of fact, supremacy of law, and subordination of judge to law have, in the overall context of the Marxist teaching on state and law, a totally different social meaning from what they have in the overall context of juridical-positivist notions, just as the applications of these principles differ under capitalism and socialism respectively.

Ever since its appearance on the political arena, Marxism has consistently criticised both juridical positivism and all other manifestations of this trend, for example, vulgar political economy. Marxism demonstrated the scientific bankruptcy of juridical positivism and its apologetic character at a time when no one in bourgeois legal science gave a thought to the "refuting of positivism" that was to become so fashionable later.

³⁰ R. David, *Les grands systèmes de droit contemporains*, Paris, Dalloz, 1964, p. 71.

The main argument advanced in trying to establish a kinship between the Marxist and positivist views on law is that both, so the allegation goes, see the law-state relationship in the same light, proclaiming the first as a product of the second, thereby clearing the way for *etatism* and the totalitarian state. Clearly, those professing to see this kinship take liberties with the positivist concept. Its methodological base—the study of law in its own right—is simply brushed aside (even bourgeois critics realise the futility of trying to align positivist methodology with that of Marxism) and juridical positivism emerges as a doctrine that regards law as a product of the state, a result of its activity. But the crux of the matter is that this aspect of positivism is inseparably linked with its methodological postulates, like all its other arguments and propositions.

Marx and Engels consistently opposed the positivist-voluntarist view of law as a product of the free and independent functioning of the legislator, the sovereign, political authority. As they saw it, bourgeois law was simply the will of the class of the bourgeoisie made into a law for all, a will, whose essential character and direction are determined by the economic conditions of existence of this class.³¹ *The German Ideology*, a work vital to an understanding of Marxism, had, as one of its chief aims, the refutation of the positivist concept of justice and law as the “sovereign will of the state”. Law has its roots in exactly the same socio-economic conditions as the existing state—such is the Marxist view on law, a view alien to positivism and, indeed, beyond its comprehension. “The individuals who rule in these conditions, besides having to constitute their power in the form of the *State*, have to give their will, which is determined by these definite conditions, a universal expression as the will of the State, as law—an expression whose content is always determined by the relations of this class, as the civil and criminal law demonstrates in the clearest possible way. . . . Incidentally, it is only in the imagination of the ideologist that this ‘will’ arises before conditions have developed far enough to make its production possible. After conditions have developed sufficiently to produce it, the ideologist is able to imagine this will as being

³¹ K. Marx and F. Engels, *Selected Works*, Vol. 1, p. 123.

purely arbitrary and therefore as conceivable at all times and under all circumstances."³²

Marx and Engels have yet another, briefer formulation of what is basically the same idea concerning the positivist-voluntarist concept: "Since the state is the form in which the individuals of a ruling class assert their common interests, and in which the whole civil society of an epoch is epitomised, it follows that the State mediates in the formation of all common institutions and that the institutions receive a political form. Hence the illusion that law is based on the will, and indeed on the will divorced from its real basis—on *free* will. Similarly, justice is in its turn reduced to the actual laws."³³

According to Feuerbach, originally justice did not depend on law, on the contrary, law depended on justice. This apothegm of the German philosopher was published only at the beginning of the 20th century, when the writings of Marx and Engels had already shown with the utmost precision the historical movement of the legal forms. In primitive times "individual factual conditions in their crudest form directly constitute right".³⁴ Later, the need is felt to embrace with some general rule the recurring day-by-day functions of production, distribution and exchange, a need which finds its expression at first in custom and then, with the passage of time, also in laws. And, as society in the course of its long march through history gradually attains to higher levels, a more wide-ranging law situation sets in. "The more intricate this legal system becomes, the more is its mode of expression removed from that in which the usual economic conditions of the life of society are expressed. It appears as an independent element which derives the justification for its existence and the substantiation of its further development not from the economic relations but from its own inner foundations or, if you like, from 'the concept of the will'. People forget that their right derived from their economic conditions of life. . . ."³⁵ These words of Engels' are aimed chiefly against the juridical outlook in its positivistic aspect.

³² K. Marx and F. Engels, *The German Ideology*, Moscow, 1968, pp. 266-67.

³³ *Ibid.*, pp. 79-80.

³⁴ *Ibid.*, p. 381.

³⁵ K. Marx and F. Engels, *Selected Works*, Vol. 2, p. 365.

This criticism of the positivist-voluntarist view on law as the "sovereign will of the state" contains no suggestion that Marxism fails to appreciate the law-creating role of the state. On the contrary, it has always emphasised this role, for as stated by Marx in the foregoing quotation "... the whole of civil society of an epoch is epitomised in the state".³⁶ In the 20th century, when the everyday life of society has become infinitely more complex, the role of the state, for a variety of reasons, has grown enormously. This is true also of its role in law-making as the concentrated expression of the new requirements of society and, in the first place, of the requirements of the ruling classes. The circumstances are such that justice and law become increasingly integrated; as noted by Feuerbach, it was only originally that justice owed no dependence to law.

The important part played by the socialist state in the transitional period from the old capitalist society is common knowledge; it acts as the main lever of the socialist and, subsequently, of the communist reconstruction of society. Planning, resting on public ownership, gives an added significance to the law-creating functions of the state. It is not a matter of consolidating and "legalising" the social relationships that have emerged from the depths of the old society, it is much more a matter of creating a fundamentally new system, including an entirely new legal order. Naturally, the instrument of a reconstruction on this scale will be state-made law and not custom or precedent.

Objectively, this was bound to result in Soviet legal theory putting special stress on the law-making role of the state. In this connection, however, one other circumstance merits attention. In the 1920s, Pašukanis, Stučka and other Soviet jurists devoted much of their writing to analyses of the interrelationship between "mode of production, economic system and law". Towards the end of the 1930s, however, the views of these writers were savagely attacked by Vyshinsky with the result that the stressing of the law-making role of the state assumed a somewhat one-sided nature. This was specifically expressed in the definitions of law generally and of Soviet law in particular, given by Vyshinsky in 1938 and

³⁶ K. Marx and F. Engels, *The German Ideology*, p. 80.

used later in literature. The lack of any reference in the Vyshinsky definitions to Soviet law being conditioned by material factors (that is, insistence on its corresponding to the level of social and economic development achieved; to the fundamental principles of socialism, level of democracy, etc.) could not but lead and, in fact, did lead to justification of voluntarism in law-making. Later, this view was subjected to criticism in Soviet writing on the subject.

In their attempts to detect a kinship between positivism and the Marxist theory of law, some Western writers find themselves, so to speak, in mid-stream. Their argument runs something like this: whereas the views held by Marx himself and the Soviet theory of law in the 1920s differed from positivism, in later years Soviet theory switched to positivism. This compromise view, however, loses sight of the fact that, by and large, the Soviet theory of law has never departed from the Marxist thesis that law is always socially conditioned, that its relationship with the state as a superstructural phenomenon is conditioned in the final analysis by the economic system.

As distinct from positivism, which rules out evaluative social criteria of law and can distinguish only on the basis of purely formal criteria between the operative law and norms which have shed their validity, Marxism rules out any approach to law outside its social evaluation. The rebuke, often tendered in the direction of positivism, that it never even tries—and, indeed, is incapable of trying—to make a distinction between a just and unjust law, cannot be addressed to the Marxist theory of law.³⁷ Marxism has never affirmed that law can be only good and just, while “bad law”, or “unjust law”, do not constitute law. But it does point out precise socio-economic, political and historical criteria for answering the question: Is the given law or law institution in harmony with the system of economic and political relations, the requirements of social development or does it oppose to them the selfish interests of the ruling classes and thus constitute a step down from the level of progress already reached? This is an important part of the problem of the justice of law.

³⁷ E. Fechner acknowledges that “justice glows in the writings of the socialists” (*Rechtsphilosophie*, S. 10-11).

5. NEO-POSITIVISM, LINGUISTIC PHILOSOPHY AND LAW

We have already mentioned that neo-positivism, or, as it is sometimes described, logical positivism and development of logic were prominent among the factors that enabled positivism to survive in law in the immediate post-war years during the period of "anti-positivist reaction". Some of the points raised in this connection must be dealt with before we turn to normativism, which is currently the leading juridical-positivist teaching.

Initially, philosophical neo-positivism had little to do with the science of law. It concerned itself solely with the natural sciences, chiefly physics and mathematics and, on this ground, sought a solution to its number one problem—logical analysis of the language of science. Bourgeois law theory in its term had overlooked the Vienna Circle and the earlier varieties of philosophical neo-positivism. After the Second World War, however, it began to be influenced by logical positivism and sought to extend its own domain by moving into the related fields of ethics and morality.

Having entered the field of legal science, the neo-positivist philosophical postulates found themselves on a rich and fertile soil. The American writer Sidney Hook, not without reason, noted that "long before Wittgenstein appeared on the philosophical scene" many of his approaches had been anticipated by juridical science.³⁸ And R. Beck, referring to the influence exerted by philosophical neo-positivism on the philosophy of law, expressed the view that it is most at home in the area of social philosophy.³⁹

In point of fact, Wittgenstein, one of the founders of the linguistic philosophy, took as his starting point the proposition that "the object of philosophy is the logical clarification of thoughts. Philosophy is not a theory but an activity. . . . The result of philosophy is not a number of philosophical propositions, but their clarifications".⁴⁰ If we substitute in the foregoing quotation legal science or the philosophy of law

³⁸ *Law and Philosophy*, ed. by S. Hook, New York, 1964, p. 12.

³⁹ R. Beck, *Perspectives in Social Philosophy*, New York, 1967, p. 426.

⁴⁰ Wittgenstein, *Tractatus Logico-Philosophicus*, Moscow, 1958, p. 50 (Russ. ed.).

for philosophy, then we would get something very much like the credo of juridical positivism. It was Wittgenstein's belief that "the problems are solved not by giving new information but by arranging what we have always known"⁴¹; in Wittgenstein's view the statement "it must be like this" is not a philosophical proposition. Philosophy only states what has already been discovered, generally recognised and tried out; it establishes no new truths, but operates with those already established, subjecting them to logical and linguistic analysis. Methodological postulates of this nature had been known to and had a fairly close affinity with juridical positivism.

Given such similar grounds, it is hardly surprising that the bourgeois theory of law should turn to neo-positivist philosophy, first with the view to securing a certain prestige for juridical-positivistic methodology and, second, to apply in its own domain some of the prescriptions of this philosophy.

In an article written in 1950 under the title of "The Science of Law and Linguistic Analysis", N. Bobbio, the Italian law theorist, came to grips with the first part of this programme. He recalled the well-known indictment levelled against legal science in the last century by the German jurist Kirchmann: "From being the absolute and the eternal it is now seen as fortuitous and not without its defects . . . yet a science which has the fortuitous for its subject itself becomes fortuitous. Three decisive words by the law-maker and an entire library is reduced to pulp." According to Bobbio, this pessimistic tirade might have had justification had the quest for absolute truth really been the objective of science. But the aim of science—here Bobbio refers to neo-positivism—has long been understood by philosophy as something else, namely, analysis and verification of concepts that are already known. In the light of this "contemporary view", Kirchmann is not right because, in order to obtain recognition as a genuine science, jurisprudence may restrict itself to the function of analysing the language of the law-maker. And given this complete change in subjects, the old juridical-positivistic methodology acquires a brand new philosophical justification.⁴²

⁴¹ Quoted from M. Cornforth, *Marxism and Linguistic Philosophy*, London, 1971, pp. 138-39.

⁴² See *APhD* No. 6, 1961, pp. 205-06.

Williams, Scarpelli and other adherents of juridical positivism, in their offerings on the meaning of law, argue that in submitting one's definition one should avoid anything reflecting or corresponding to the social reality; the search, in their view, should be for the utmost clarity in the words used for the concept. As a rule, Scarpelli tells us, most of the words used are correct in their context and there can be no one definition capable of fully reflecting law as a real phenomenon. The search for a definition of this kind is one of the fundamental mistakes made by juridical thought. There can be a conventional definition of law only when, with a definite purpose in mind, it is agreed to make use of one of the existing definitions.⁴³ The choice of a single conventional definition does not in principle rule out the possible appearance of another conventional definition. As we know, the principle of conventionalism, or the "principle of tolerance", was formulated by R. Carnap and serves as one of the basic principles of the philosophy of neo-positivism.

The Scarpellian concepts bring to mind the views of a writer previously mentioned, the Englishman Glanville Williams—one of the first in Western jurisprudence to essay a definition of law based on neo-positivist philosophy. There are two reasons why British writing on the subject of law has explored the field so thoroughly. First, the predominance of the analytical school in British law theory, where juridical-positivist tradition is still deeply entrenched, and second, the predominance of linguistic philosophy in the British universities.

In the spirit of this philosophy, Williams declared that the root of the difficulties encountered by jurists in answering the question "What is law?" lies in terminological confusion, in the endeavour to establish some kind of essential basis for something which, in reality, is merely verbal.⁴⁴ By way of example, Williams recalls Somlo's criticism of Austin's definition of law (law as a binding order of the sovereign addressed to the ruled), who demonstrated the unsoundness of the definition since it took no cognisance whatever of internation-

⁴³ U. Scarpelli, *Il problema della definizione del diritto*, Milano, 1953.

⁴⁴ G. Williams, "The Controversy Concerning the Word Law", *Philosophy, Politics and Society*, Oxford, 1956, p. 134.

al law; in Williams' view, the Austin definition could be faulted also from the standpoint of Maine, who viewed law in its historical perspective, having in mind chiefly common law. According to Williams, the definitions offered by each of the three correlate with the essence of law, but not one of them could claim that his alone contained the quality of truth; each could claim legitimacy and all that mattered was choice.⁴⁵

It follows, then, that neo-positivism in its subjective-idealist approach to law goes much further than the old "classical" juridical positivism. The latter took law "as it is", whereas the neo-positivist theorists take law as it seems to them, since to exist is to exist in sensations and experience. The objective aspects of law either disappear completely or are lost amidst the less significant factors merely because to someone the latter have the appearance of being essential. The old positivism regarded law as something unambiguous and would not tolerate relativism, whereas neo-positivism goes to the extreme in relativism which, under the influence of Mach and his school, found its way into bourgeois law theory at the beginning of the century.

Neo-positivist writers on law (Williams, in particular) base themselves on those precepts of the linguistic philosophy which ordain that the use of a particular word by no means signifies that the object to which it refers has any existence in reality, or is more or less clearly expressed by it. True, Williams does not go so far as to say that behind the word "law", for instance, there is no real object. The law functions, and its functioning can be, and often is, reported and described. As description and as a setting forth of definite facts, the theory of law can, with justice, lay claim to a certain authenticity, since statements descriptive of legal actions can be subjected to verification. But this is not the case with the definition of the concept of law or of the word "law"; here verification is ruled out, because in the Wittgenstein view and in that of other linguistic-philosophy theorists, verifica-

⁴⁵ In the last book which he wrote, Scarpelli insisted that recognition of the legal norm, established by the state, depends on the choice of attitude, and positivism makes that choice (*Cose il positivismo giuridico*, Milano, 1963).

tion is possible not of the general rule itself, but only of its observed manifestations, and these, in turn, are no more than the sum of our sensations, our personal experience. This kind of approach, in effect, makes nonsense of extremely important aspects of the general theory of law whose arsenal is stocked with the most general abstract concepts. "The general theory of law may be defined as the development of the basic, that is, the most abstract of the juridical concepts. Among these are definitions such as the 'juridical norm', 'juridical relationship', the 'subject of law', and so on. Due to their abstract nature, these concepts hold good for each and every branch of law; their logical and their systematic significance remains the same whatever the particular content they are applied to. . . ." ⁴⁶ These general concepts are the result of the historical development of law and the legal consciousness, of the moving away from casuistical norms and notions towards generalising juridical norms, categories and principles.

The task confronting the theory of law is to provide a genuinely scientific explanation and definition of these general concepts, a definition reflecting their essential and objective features. But with a neo-positivist approach this task cannot be accomplished, since a general definition of such abstract juridical concepts cannot be verified. And a proposition which cannot be verified (that is, measured against the neo-positivistic sensory experience) and, consequently, cannot be recognised as true or false, would be regarded by neo-positivism as falling short of the scientific. The same goes for the basic general concepts of the theory of law, which is thus deprived of scientific meaning and has to be replaced by a new science, by something in the nature of a linguistic theory of law or juridical semantics.

Legal science is the arena of much disputation of a scholastic-terminological nature, of discussion about concepts, in the course of which contradictory readings and errors of logic are not uncommon, thus tending to justify the claim that the linguistic philosophy which aims at putting right such deficiencies, be included in the science of law. There can be no

⁴⁶ E. B. Pašukanis, *The General Theory of Law and Marxism*, Moscow, 1926, p. 11 (in Russian).

doubt either that for the purpose of correct usage, juridical concepts and categories stand in need of a careful linguistic and semantic overhauling. But this is not enough to produce a new doctrine of law.

Not long ago, the American jurist R. Summers claimed that with the appearance of the "new analytical jurisprudence", we now had an "autonomous discipline", important from the standpoint of practice and full of promise.⁴⁷ Unlike the old analytical school, its successor was "less doctrinal", had "less positivism" in it, and "subjected to analysis a wider range of concepts".⁴⁸

These assertions, however, have a somewhat hollow ring and Summers has not succeeded in proving the practical usefulness of the "new analytical jurisprudence". It would seem that the "new methods" of the analytical lawyers bear a close resemblance to those juridical-logical methods of interpretation in vogue long before the linguistic philosophy appeared on the scene.

Of course, there is nothing wrong with further logical, conceptual and semantic analysis in the realm of law. But the mistake here and, as we see it, the mistake is a major one, is in absolutising the logical-linguistic methods in law studies and applying them to areas where the real need is a thorough all-round analysis of social practice, of class movements and of the manner in which the state performs its functions. This is a copy of the mistake made in its time by positivism except that in its new form it looks even more glaring.

The British Marxist Maurice Cornforth makes the point that the very impressive body of descriptive knowledge supplied by positivism "is social science only in the sense defined by the positivist philosophy of science, not in the sense that it reveals the objective structure and movement of human society in its historical development. Accordingly, it serves the turn of those who, as Marx said long ago of Adam Smith—are 'preoccupied' and interested from a practical point of view in the process of bourgeois production, who accept the system and do not wish to see beyond it; but not

⁴⁷ R. S. Summers, "The New Analytical Jurist". In 41 *New York University Law Review* No. 5.

⁴⁸ *Ibid.*

of those who want to understand how to change it, and to emancipate mankind from exploitation. For that purpose more than merely descriptive science is required for the mastery of nature."⁴⁹ This view applies in full measure both to the old-time juridical positivism and to its modernised neo-positivist version.

6. THE HART CONCEPT

In the 1960s, Western writers on the subject of law became very interested in the conception advanced by Professor Hart in his *The Concept of Law*.⁵⁰ Before succeeding Professor Goodhart as Professor of Jurisprudence at Oxford in 1952, Hart taught philosophy also at Oxford where, true to British university tradition, he adhered to the logical-positivist school. His early writing may be summarised as an attempt to develop, on juridical examples, some of the theses of logical positivism; it differed little from conventional neo-positivism.⁵¹ While it would be true to say that in *The Concept of Law*, his major work, there is some analysis in the spirit of linguistic philosophy, the book as a whole pursues a different aim. Hart's preoccupation is with reforming the analytical concept emanating from Austin and Bentham; in doing so, moreover, he is obviously much concerned with the bourgeois critique of positivism. This approach put him in favour with the anti-positivists, especially the supporters of the "revived natural law".⁵² At the same time, due to his championship of the analytical school, Hart enjoyed some prestige among the spokesmen of the positivist and neo-positivist trends, especial-

⁴⁹ M. Cornforth, *Marxism and the Linguistic Philosophy*, pp. 71-72.

⁵⁰ H. Hart, *The Concept of Law*, Oxford, 1971.

⁵¹ For example, in an article in *The Law Quarterly Review*, Vol. 70, No. 277, headed "Definitions and Theories in Jurisprudence", Hart suggested that the traditional juridical concepts, such as subjective law, have no real analogue in the world of facts and call for special analysis in each case; there is no single definition that would cover every such concept and the meaning of the concept depends every time on the context to which it applies.

⁵² See, for example, A. D. Entrèves, "Un noyau de bon sens, a propos de la théorie droit naturel, chez H. Hart". In: *Revue internationale de philosophie* No. 65, 1963, p. 312.

ly in the United States where he had lectured for several years.⁵³

Hart has never deviated from his approach to law as an aggregate of obligatory norms and, on these grounds, he is critical of the sociological realists for whom law consists of factual relationships and the working of the courts, and, in equal measure, also of propositions associating the legal essence with natural-law and moral criteria. "The assertion that 'an unjust law is not law' has the same ring of exaggeration and paradox, if not falsity, as the assertion 'statutes are not law' or 'constitutional law is not law'."⁵⁴

Simultaneously, however, Hart draws a distinction between himself and Austin, for whom the legal norm was the command of the sovereign. He refuses to follow Austin and the old positivism in regarding the state power as the source of law. Hart's idea is to adapt the analytical concept to the changing milieu, including the idea of the primacy of law *vis à vis* the state. But what to put in the place of the Austinian sovereign?

Hart resolves the issue by advancing a theory of so-called primary and secondary rules. The primary rules, or norms, are those which designate the citizen's rights in the society and which point to his obligations; these rules place the citizen, so to speak, in a definite public frame. A typical example of the primary rule is the criminal law prohibition of murder, of robbery and so on. Primitive society was based solely on primary rules. Taken in isolation, they have several defeats—too rigid, too general, and difficult to enforce. However, in more advanced society for all these defects there is some remedy in the shape of the secondary rules, which, in turn, are subdivided into three groups. Of the latter, most important are the "rules of recognition", which determine the validity of all the others. A rule of recognition may be complicated. For Hart the fundamental one is the Constitution of the country. Another secondary group (rules of changes) defines the manner of changing primary rules by way of wills

⁵³ In the article mentioned above, Summers attributes the consolidation of the new analytical school in that country to Hart's popularity in the US. See also *The University of Chicago Law Review* No. 1, 1967, which is devoted to the Hart concept.

⁵⁴ H. Hart. *The Concept of Law*, p. 8.

and testaments, contracts, and so on. The third and last group of secondary rules consists of rules of adjudication, needful for imposing sanctions in the event of breaches of the primary rules. Law is the union of primary and secondary rules; "the union of primary and secondary rules is at the Centre of a legal system". "Once we abandon the view that the foundations of a legal system consist in a habit of obedience to a legally unlimited sovereign and substitute for this the conception of an ultimate rule of recognition which provides a system of rules with its criteria of validity a range of fascinating and important questions confronts us."⁵⁵

The questions raised by this theory are certainly perplexing. It is far from clear, for example, in what way the primary rules differ from subjective rights and obligations. On what factors do the primary rules depend prior to the appearance of the secondary rules, and do these factors continue to operate when the secondary rules appear on the scene and begin to exert their influence? And, in any case, how does one explain their appearance? However, it is not our purpose to engage in an immanent critique of the Hart concept, nor do we insist on perfecting it.

It is fairly obvious that Hart divides in two a legal system that has taken shape in a highly-developed state-organised society, and one of the parts—the complex of secondary rules—takes upon itself a role that in reality is assigned to the state. Law remains a system of rules, but with the rules ordained not by the state but constituted in some other way, out of themselves, as it were. Hart believes that in this way he has overcome the basic—in the eyes of its bourgeois critics—defect of positivism, namely, the idea of law as a state-made product and the possibility, arising therefrom, of arbitrary law-making. The advantage of his system, as he sees it, is that the state (in keeping with British tradition, he identifies the state with the officialdom) is placed within the strict limits of the secondary rules, particularly the Constitution as the rule of recognition. But this is surely a fictitious overcoming of the problem. Primacy of law is achieved simply by a bypassing of the state which, nevertheless, functions as usual and has its own say about both

⁵⁵ H. Hart. *op. cit.*, pp. 77, 96, 107.

primary and secondary rules. The specific features of the British Constitution—its long existence and permanence—lend support to the Hart concept. But how would this concept fare, say, in France, where that higher rule of recognition, the Constitution, is changed so frequently by the state authority? One is left with the impression that neo-positivism all but removes from the agenda the problem of the law-state relationship and parts company even with that formalised, far from perfect linkage, that helped the earlier positivism not to lose sight of a highly important sociological regularity.

The idea of deducing law from law is not new to bourgeois legal writing. Merkl and Kelsen's hierarchic theory has been in existence for more than one decade and Hart's secondary rule of recognition, acting as the source of the other rules, is, in fact, not very far removed from Kelsen's "basic norm". Hart engages in a Kelsenian-style trimming exercise where the traditional British analytical school is concerned, but on the overall view his concept can only be regarded as a reproduction, or repetition, of the Kelsenian normativism.

In Hart's view, compulsion (he also calls it serious social pressure) is an important element of law. Yet he is against defining law as a compulsory order, a view which brings him into disagreement with Kelsen; in this respect, he remains faithful to the English analytical school. Goodhart, who preceded him as professor of law at Oxford, faulted Kelsen for failing to make a distinction between "obligatory" and "compulsory" orders. Goodhart went so far as to disregard sanction as a necessary element of law. "The sanction is applied because they [the judges—*Ed.*] recognise that the rule is obligatory; the rule is not obligatory because there is a sanction."⁵⁶

Hart's reasoning, although not quite so categorical, echoes this thought. His starting point is the "idea of the obligatory"; where there is law, the behaviour of people becomes obligatory. He refers to the difference between the expressions "being obliged" and "having an obligation" and the drawing of this distinction has been much publicised in Western writing as a classical model of the application in law of the linguistic philosophy. Actually it boils down to the somewhat banal

⁵⁶ A. Goodhart, *English Law and the Moral Law*, London, 1953, p. 1.

conclusion that when someone feels himself psychologically obliged it is not always a matter of legal obligation, and, on the contrary, something may be established as obligatory, but the person in question may not be psychologically conscious of the particular legal postulate.⁵⁷ In principle there is nothing wrong with this demarcation, but it still does not tell us why the rules of law are obligatory and what makes them so? The most that can be extracted from the distinction cited here is that they are made so not by the psychological attitude of those who are subject to the law.

Hart's mindfulness of the criticism of positivism was expressed not only in his revision of Austin's definition of law. More than any other of the pro-positivist school, he devoted close attention to morality and its relationship to the concepts of justice and law. He never budes from the view that the effectiveness of law does not depend on evaluations; that what might be judged bad law on moral grounds did not cease to be law; but he stresses the influence of morality on law, which may be exerted both legislatively and by way of legal process.

Characteristically, he is much more reluctant to admit that the influencing could be the other way round—law exerting influence on morality; and in some cases improvement in morality brought about by law is, in his view, immoral.⁵⁸ He is ready to grant that a certain minimum of the universally recognised elementary principles of conduct established in a more or less developed legal system, may be regarded as natural law.⁵⁹ At the same time, like many other present-day positivists, he stresses that for purposes of evaluating operative law there is no compelling reason for reverting to natural law. One can maintain that the only law worthy of recognition is the operative law, and still demand its amendment and improvement. Following up this idea, one of Hart's American disciples, S. Shuman, in a polemic with West German natural-law enthusiasts (such enthusiasm was particularly common there after the war), argued that analytical jurisprudence could get on quite well without natural law because

⁵⁷ H. Hart, *op cit.*, pp. 79-96.

⁵⁸ Hart, *Law, Liberty and Morality*, Stanford, 1963.

⁵⁹ Hart, *The Concept of Law*, p. 189.

wherever, as in the case of his own country, genuine democracy prevailed, positive law could be criticised without any need to fall back on natural law; whereas, in countries at a lower level of democracy, for example West Germany, one could, of course, resort to natural law.⁶⁰ In West-German legal writing, this line of reasoning qualified for a cool reception.

7. "JURIDICAL LOGIC"

In modern legal literature the term "juridical logic" implies a whole series of problems, most of which, however, are beyond the scope of this chapter. It signifies, for example, employment of mathematical logic for elaborating the informational language of law which, in turn, is needed for the application of cybernetics in the juridical-technical sphere, especially in arranging for quick and easy access to case materials.⁶¹ The use of mathematical (symbolical) logic reflects a general trend in contemporary science towards formalisation. Juridical logic may also mean the use of logic in a court inquiry, in building a case and in legal argument in general. On the one hand, this practical field is rich in materials illustrative of particular laws and of the rules of logic, and, on the other, it typifies (and here it differs from many other areas of public life) the conscious application of the law and of the rules of logic for the purpose of achieving

⁶⁰ S. Shuman, *Legal Positivism. Its Scope and Limitations*, Detroit, 1963. Scarpelli similarly considered the positivistic legal method an essential condition for the proper functioning of a liberal and democratic state, in which condemnation and elimination of unjust enactments is not entrusted to individual resistance, but to institutions regulated by positive law. Quoted by N. Bobbio in "Trends in Italian Legal Theory", *American Journal of Comparative Law* No. 3, 1969, p. 338.

⁶¹ This is a matter of real urgency in countries where precedent is the rule. In the United States, for example, the total of precedents runs into millions. The American author Stone estimated that by 1953 the number of court decisions totalled 2,100,000 (compared with 5,000 English cases in Coke time, and 10,000 at the time of Mansfield and Blackstone). In 1958 alone, American state and federal courts were authors of not less than 108,000 pages comprising 76,500,000 words (J. Stone, *Legal System and Lawyers' Reasonings*, Sidney, 1964, p. 40). These figures indicate an urgent need for automated filing and retrieval of information, sometimes referred to as legal electronics.

definite aims and results.⁶² And both in these and in other aspects juridical logic, as a generalisation and development of the experience of the use of logic in law, has a right to existence and is indispensable in practice.

Juridical logic figures in our criticism of positivism only where the importance of the logical methods of law study is exaggerated and formal logic is built up into an independent and self-sufficient theory of law cognition. This is how classical juridical positivism in its day used classical formal logic. Contemporary positivism, however, constantly enlarges its arsenal of logic, and also tries to draw upon the newer branches and divisions of formal logic. Its intensive development is used to bolster up the older positivist formal-theoretic postulates. The defect of positivism and of the formal dogmatic jurisprudence was, so it is claimed, not in formal logic being declared the basic theory of law cognition, but rather in the fact that this logic itself was not sufficiently developed; hence the application of its forms and divisions in the shape of symbolic, deontic and intuitional logic can cure the failings of the old positivism.

The mistake of this older positivism, in the view of L. Phillips, for example, lay in its adherence to the classical formal logic, which was suited only to the "closed systems". Law, however, is an "open system" and as such should be dealt with by intuitional logic, which links up with the idea of mathematical infinity. Intuitional logic is to combat the natural-law idea, which turns out to be superfluous for judicial reasoning, a function for which intuitional logic is excellently suited by virtue of its rejection of the law of the excluded middle.⁶³

Resort to intuitional logic, however, is not typical. What one encounters much more frequently are efforts to combine the problems of legal science with deontic logic (G. Kalinowski),⁶⁴ with symbolic logic or logistics (U. Klug),⁶⁵ and with the topic or the "new rhetoric" (T. Vieweg, Ch. Perel-

⁶² See, in particular, A. A. Starchenko, *Logic in Court Inquiry*, 1958 (in Russian); see also, Z. Ziembinski, *Logika praktyczna*, Poznan, 1956.

⁶³ L. Phillips, "Rechtliche Regelung und formale Logik", *ARSP* No. 3, 1963.

⁶⁴ G. Kalinowski, *L'introduction à la logique juridique*, Paris, 1965.

⁶⁵ U. Klug, *Juristische Logik*, 1966.

man).⁶⁶ In a questionnaire circulated by a French philosophical journal on the subject of juridical logic, the first question on the list sought opinions on the benefits likely to accrue to lawyers from a study of contemporary logic, while the last on the list called for views on the possible usefulness to juridical logic of a study of the dialectic in the modern Hegelian and Marxist sense.⁶⁷ Answers to the first query were mostly favourable, to the second, although with reservations, overwhelmingly sceptical. Formal logic (including its modern branches) is not seen as a component of the complex dialectical process of cognition, but on the contrary, it is the dialectic which, at best, is regarded as an appendage to juridical logic.

In Soviet studies of law, much research has been carried out with regard to the place and usefulness generally of formal logic in the methodological arsenal of juridical science. While emphasising, first, its importance in resolving the problems that arise in legal science, especially the study of positive law with a view to ensuring its correct application and, secondly, the unsoundness of any counterposing of formal and dialectical logic which, in the actual process of cognition, act in unison, with one complementing the other, Soviet writers nevertheless justifiably argue that formal logic cannot be used as an independent theory of cognition of juridical science, always provided that the latter is not reduced to a narrowly descriptive study; the very act of defining the limits of the rules of formal logic can be performed only by acknowledging dialectical logic as the sole scientific theory of cognition.⁶⁸

This conclusion derives chiefly from analysis of the application in law studies of the rules and principles of the classical formal logic. However, if one were asked whether or not this conclusion has been influenced by the intensive development

⁶⁶ T. Vieweg, *Topik und Jurisprudenz*, München, 1954; Ch. Perelman, *La théorie de l'argumentation*, Brussels, 1958, and *Droit, morale et philosophie*, Paris, 1968.

⁶⁷ *APhD*, Vol. XI, 1966, p. 205.

⁶⁸ A. A. Piontkovski. "On a Methodological Study of Law Functioning", *Annals of the All-Union Institute of Juridical Science* No. IV. 1947, p. 54 (in Russian). See also V. P. Kazimirschuk, *Law and the Methods of Its Study*, Moscow, 1965, pp. 50 ff (in Russian).

of new branches and divisions of formal logic, the answer would be no.

Obviously, it would be naive, and from the standpoint of science retrogressive not to see that formal logic opens up new possibilities for juridical science, including the general theory of law. We have already referred to the prospects offered by cybernetics, a precondition for which is, of course, application of mathematical logic.⁶⁹ Cybernetics could be of help also in studying the structure of the legal norms and of the normative interconnections in a given legal system, in revealing gaps in the law, and so on. Certainly mathematical logic makes it easier to study a much wider range of relationships expressing the legal phenomenon under investigation than was the case with the classical formal logic. For one thing, it is less static and has the additional advantage of being able to reflect elements in the process of movement and change. Clearly, new opportunities in the study of law may be revealed by the development of another branch of formal logic, the logic of normative propositions.

This, however, by no means guarantees fair weather for the positivist inclination openly to proclaim, or silently to presume, formal logic as the sole, or basic, or at any rate as an adequate and satisfactory method of law cognition. Given the very best intentions, the hypertrophy that has overtaken formal logical methods in law leads, objectively, to a belittling of the sociological, historical and other extra-logical methods and equally, of the dialectical approach.

Irrespective of the scale on which, say, the logical-symbolic interpretation of positive law is applied, it cannot by itself be adequate to the purpose of solving the numerous theoretical and social problems which have the effect of turning legal studies from a practical descriptive discipline into one of the most important of the social sciences, wide-ranging in outlook and richly endowed with powers of cognition. Nor should one lose sight of the fact that the actual use of symbolic logic in solving legal problems assumes that these problems

⁶⁹ For details see D. A. Kerimov: "Law and Cybernetics", *Sovetskoye gosudarstvo i pravo* No. 9, 1964; V. Knapp, *O možnosti pouziti kybernetických metod v pravy*, Nakladatelství československé akademie věd, Praha, 1963.

have already been stated, and the elements of each problem have a quite definite and already elaborated content. Lacking this "preliminary knowledge" obtained by various means, symbolic logic could not be used. Its sphere of action is therefore restricted just as its conclusions are limited to a merely formal correctness.

It will be appreciated that far from all the new branches of logic qualify for use in the field of law. It is doubtful whether intuitionist logic can be used for the study of positive law. Supporters of the "topic", a subject on which much has been written in West German law journals, have yet to succeed in proving that this category, dating from Aristotle (a system of argument based on probable premises), really has the capacity to broaden our views on law and its basic problems and, in general, whether it is at all adequate to the requirements of developing contemporary scientific knowledge (this question does not arise in the case of mathematical logic). Clearly, the development of law theory should not confine itself to merely illustrating the new systems of logic with examples from legal practice, which is what "juridical logic" frequently does. On the other hand, not every problem encountered in legal practice is in need of verification or illustration by way of fashionable formal-logic methods. The Soviet author Kopnin rightly warns us against the use of techniques of mathematical logic in every branch of science "merely for the sake of having new methods of expression or recording relationships already known. The new recording itself yields nothing new in science or any new aspects of the knowledge already at our disposal. What is more, our experience is that the translation of any recognised new branch into the formal language of contemporary logic results in loss of a part of its content. Of course, if new knowledge is obtained by way of such translation, this loss is compensated. Nevertheless, the mere act of translating what is known from one language into another, from the substantial to the formalised, yields precious little."⁷⁰

In principle, there can be no objection to "juridical argumentation" in case procedure, that is, the use of logical and

⁷⁰ P. V. Kopnin, *The Logical Foundations of Science*, Kiev, 1968, pp. 31-32 (in Russian).

even rhetorical methods in decision-making (Perelman gives us a detailed analysis of "juridical argumentation"). But, in granting this, it would be incorrect and in line with the neo-positivist spirit to reduce the study of court cases solely to juridical logic to the detriment of analysis of the given case in the light of the social factors which, in one way or another, influence the final judgement. With an approach of this kind, the social content of the process of justice is concealed in a "logical casing", with the result that defects in judgement are attributed to a lack of logic on the part of the judge himself. Nor should one lose sight of the fact that the logical equipment at the disposal of the court in decision-making is by no means equivalent to that of the scholar engaged in an investigation of legal procedures. His functions are different, and his methods must have a much wider range. Incidentally, the neo-positivist "juridical logic", like the old "classical" positivism, is inclined to erase this distinction, restricting thereby the aims of scholarship to those of judicial procedures.

8. Kelsen's "PURE THEORY OF LAW"

The dominant positivist doctrine in 20th-century bourgeois jurisprudence is normativism, which if one ignores some of its minor variations, may be identified with the so-called pure theory of law.

The "pure theory" has been with us now for at least half a century. Its persistence, popularity and facility for adapting to various specific historical conditions are connected not only with the generally-recognised tenacity of legal positivism, but also with the ceaseless and purposeful strivings of its founder, Hans Kelsen. Kelsen, undoubtedly, is one of the outstanding figures in 20th-century bourgeois law studies; his theory has never ceased to hold the attention of students of law.

Kelsen built up his system, which obviously set out to reach the peak of legal thinking, in the years leading up to the First World War. Since then, he has actively defended his position. Since he settled down in his self-built fortress, estrangement has set in between him and those colleagues who

helped him in building it, namely, the men of the famous Vienna Circle—Verdross, Merkl and others. Suggestions by his colleagues for any substantial change in the system were met with refusal and a grim intolerance. Such “sins” were punished by exclusion from the Kelsen school. The point at issue, however, was not that he should bring his system into a closer affinity with the social reality, but merely that he should refurbish it by including some more fashionable philosophical concepts than neo-Kantianism, for example, phenomenology. Bearing a close resemblance to his own teaching, the concepts advanced by H. Nawiasky differing only in such details as the “normological theory”, failed to obtain support from Kelsen.

Kelsen went to the extreme in methodological positivism and produced the most formalised version of the already formal juridical method. Hence the severe criticism by the anti-positivistic trends, by the sociological camp in particular, and also by neutral scholars who sought to soften some of the rigours of “the pure theory”.⁷¹ With the sociological, historical and generally speaking all the metajuridical concepts running foul of the postulates of “the pure theory” since such concepts smacked of the political and the ideological and for this reason were incompatible with “objective” science, Kelsen dismissed them as “unscientific” and strictly “ideological”. He would respond only to “scientific criticism” which, of course, could be none other than immanent criticism of his system, i.e., criticism sharing his own principles. Kelsen’s objections thus amount to no more than Kelsen was saying that some of his propositions have been misunderstood. The Soviet jurist E. Pašukanis made the point that with Kelsen “one cannot say that in reality things are not so, for the simple reason that he, as a ‘pure’ jurist, has no desire to have anything in common with reality”.⁷²

Kelsen combined defence of his views with ceaseless denunciation of those of his opponents belonging to other schools—the natural-law school, sociological law and, later,

⁷¹ The Spanish writer on the philosophy of law, Legaz y Lacambra, refers to the 20th-century bourgeois legal thought as an interminable dialogue with Kelsen. (Quoted from K. Leiminger, *Die Problematik der reinen Rechtslehre*, Wien, 1967, S. 6-7.)

⁷² *Vestnik sotsialisticheskoi akademii* No. 5, 1923, p. 228.

the existentialist philosophy of law. He was skilful in the art of manoeuvre and, when necessary (for example, after leaving for the United States shortly before the outbreak of the Second World War), he flirted with the American sociological school and, before that, with the Duguit outlook. By and large, however, his attitude to the other schools is somewhat arrogant; naturally, he acknowledges their right to existence, but always with the reminder that they have failed to get anywhere near the objective level of his system, since they are constantly in danger of veering towards false ideology, political involvement, and so on.

His "pure theory" had its moment of glory during the interwar years. But after the Second World War, its influence in Europe waned—a process in which the anti-positivist trends mentioned above played a major part. An interesting point is that although he lectured in the United States for many years, his normativism failed to attract any great support there. Evidently, neither the methodology nor the style of the "pure theory" appealed to the American way of thinking. Its complexity made it unsuitable for the post-war bourgeois ideology, which was searching for ideas and constructs that could be easily switched from the academic cloisters to the broader fields of propaganda. So the "pure theory" began to be elbowed out not only by sociological jurisprudence and political science, but also by the philosophy of law, where neo-Kantianism—one of the props of the Kelsenian system—was suffering a severe decline in popularity. Even the contemporary positivism preferred not to refer to the normative neo-Kantian scheme. In Europe, too, Kelsen's following had dwindled.

However, it would be wrong to conclude that Kelsen's theory belongs to the past. There are countries, chiefly in Latin America, and especially Argentina, where it has a considerable following. In fact, in some of the law faculties there is what might be described as a Kelsen cult. Undoubtedly, the ideas and the postulates of normativism, as set forth in the "pure theory", exert a fairly considerable influence on present-day bourgeois law thinking, an influence which benefits from Kelsen's personal prestige and his vast activity.

In the post-war years Kelsen set to work to arrest the declining prestige of his theory (and of himself as a theorist),

to show that it could still be used as an ideological arm of imperialism.

One such step has been the carrying over of the "pure theory" into the sphere of international law. Kelsen realised that in this particular sphere he could, possibly, be of use in securing rejection of sovereignty in favour of primacy of international law over the national. Both conclusions follow logically from his so-called "hierarchic" structure of law. His forays in the realm of international law have been widely reviewed in the Soviet international-law doctrine.⁷³ In the international aspect, however, Kelsenian views feature prominently in bourgeois international-law thinking, especially in the United States.

Another feature of his recovery operation is a heavily stressed and advertised anti-communism. His contribution to cold-war literature was *The Communist Theory of Law*, a book which attempts to prove that the application of Marxism in the sphere of law has produced no worthwhile results.⁷⁴ This, however, was not his first clash with Marxism. Back in the 1920s, shortly after the October Revolution, when the subject of the state occupied the foreground in revolutionary theory, Kelsen joined in the fray against the Marxist teaching on the state with a work entitled *Socialism and the State*.⁷⁵ Since in those years he was flirting with the so-called Austro-Marxists, he conducted his critical research under the slogan—socialism yes, Marxism no. Socialism, he argued, pontificating about the supra-class nature of the bourgeois state, would find salvation by rejecting Marxism in favour of Lassallianism. Then, some thirty years later, came his *The Political Theory of Bolshevism. A Critical Analysis*.⁷⁶ Significantly, in this latter work the pseudo-socialist phraseology is absent. Instead, the reader is presented with a mixed offering of hymns of praise to the kingdom of capitalism and a

⁷³ See, for example, G. I. Tunkin, *Problems of the Theory of International Law*, Moscow, 1962 (in Russian); D. B. Levin, *Concerning Contemporary Bourgeois Theories of International Law*, Moscow, 1959 (in Russian).

⁷⁴ H. Kelsen, *The Communist Theory of Law*, London, 1955.

⁷⁵ H. Kelsen, *Sozialismus und Staat*, Wien, Leipzig, 1923.

⁷⁶ H. Kelsen, *The Political Theory of Bolshevism. A Critical Analysis*, University of California Press, 1948.

raining down of fire and brimstone upon the socialist state and upon Marxist-Leninist political and law ideology. Indeed, the author unblushingly declares that the aim of his work is to prove that it is impossible to work together in the United Nations Organisation.

These concentrated anti-communist outpourings, not only reflect the outlook and political views of the author, they are, in a sense, acts of self-justification. The point is that from the standpoint of the "pure theory" it is impossible to deny the existence of law under socialism. Kelsen is actually jealous of the "revived" natural-law doctrine, which simply glosses over socialist law saying that it is incompatible with certain higher "legal principles". "We", he thunders, "should feel for it [socialist law—*U.T.*] the disgust with which we would look on a poisonous reptile. But it exists, that we cannot deny. This means that it functions."⁷⁷ Evidently, this special zeal in anti-communism is an attempt to make up for the "defect" in his own teaching.

Since the Second World War, Kelsen has produced more books, while some of his earlier works appeared in new editions. Some Western writers, basing themselves on these reprints, even tend to the view that the "pure theory" of the 1960s is not an exact replica of what it was in the 1930s, and the above-mentioned Legaz y Lacambra makes the wry comment that "the Kelsen of American soil is no longer a Kelsenian".⁷⁸ This, however, is criticism from within. Whatever the changes and additions Kelsen may have introduced into his earlier writing, the purpose has always been a restating and reinforcing of the previous standpoints and conclusions.

A. Normativism as a Linking of Positivism with Neo-Kantianism

Essentially normativism may be defined as the reproduction of positivism on the basis of neo-Kantianism. We have already noted that the decline in positivism at the turn of

⁷⁷ *OZOR* No. 1-2, 1963, S. 148.

⁷⁸ Quoted by J. Prevault, in: *La doctrine juridique de Kelsen*, Paris, 1965, p. 59.

the century was accompanied by the appearance of a number of new schools of law—sociological, psychological and others. Kelsen, not surprisingly, took a hostile view of these developments. In an “utterly unscientific way”, he complained, “jurisprudence has become a hotch-potch of sociology, biology, ethics and theology; there is no specialised science in which the jurist does not feel at home; and what is more, he believes that the more he draws upon other disciplines, the greater his standing. The inevitable result is the end of any true science of law”.⁷⁹ To this “abnormal situation” he counterposed his “principle of elimination”, with its insistence that law theory, in keeping with positivist tradition, should rule out every metajuridical approach to law, that the proper study of law was law itself.

Kelsen starts by indicating what the student of law should not do if he is really anxious to acquire an understanding of law as a social phenomenon of a special kind. In keeping with the traditional positivism, Kelsen inveighs against the metaphysics of natural law, with which, he says, it is possible to prove “everything and nothing”.⁸⁰ He faults natural-law ideology, first, because it allows one to give the same social phenomena and institutions diametrically opposite evaluations and, second, because in the final count it is inevitably associated with belief in a supreme being, as is clearly demonstrated by the “resurrection” of natural law after the Second World War. The road from legal positivism to natural-law doctrine was that of man to God, of science to theology. Here, of course, he is, generally speaking, right. Still, his rebukes provide no grounds for wholesale condemnation of every attempt at evaluating law. Assuming that the natural-law teaching provides incorrect and, at best, inadequate criteria for evaluative purposes, that justice as the basic natural-law criterion tends to be a vague, abstract and, frequently, subconscious concept, Kelsen rules out the possibility of any social evaluation of law in general.⁸¹ The theory of law, if it claims to be scientific, is obliged to see law as it

⁷⁹ J. Prevault, *op. cit.*, p. 14.

⁸⁰ H. Kelsen, *Reine Rechtslehre*, Wien, 1960, S. 430.

⁸¹ Kelsen himself in his *Was ist Gerechtigkeit* (Wien, 1953) wrote about the unknowability and irrationality of justice.

really is, without upholding it as just and, by the same token, without condemning it as unjust. In this sense it is a "radically realistic and empirical theory. It declines to evaluate positive law".⁸² But is it possible to see law as it really is and not attempt its social evaluation? Unless we do so, does not law emerge as something entirely different from what it really is?

Farther, Kelsen rules out the sociological approach, which to his way of thinking simply confuses the problems of legal science with other disciplines. Study of the social factors, with their influence on legislation, justice, defining man's behaviour in relation to law—all these in the Kelsenian view are meta-juridical matters which do nothing whatever to aid our understanding of what law is, since the answers may differ, yield incompatible results. If we wish to explain what a table is there is no need, in his view, to bother about how it came into the world, who uses it or why they use it. And the same goes for law. He has nothing against studying its sociological aspects, but then that is a subject for other disciplines which, as distinct from the "pure theory", can pinpoint neither basic nor permanent features of law nor its essence. Here, it would seem, we are picking up echoes of the Jellinek view with its distinctions between the juridical and sociological aspects of the state. But Kelsen himself wrote of the Jellinek view in a highly critical vein. According to Kelsen, the juridical definition of the state is more than one of its possible aspects; it is an expression of the very nature of the state.⁸³ Similarly, only the "pure approach" to law can express its nature and essence.

With equal consistency, Kelsen also rejects the possibility of explaining the nature of law from the standpoint of the political and ideological factors influencing it. Here, however, he mixes two different problems: the use of a particular law doctrine for certain political or politico-ideological aims, and the relationship between law and politics (or ideology) that is, what role politics (or ideology) plays in the content, application and development of law. The second problem is simply

⁸² H. Kelsen, *General Theory of Law and State*, Cambridge (Mass.), 1945, p. 13.

⁸³ H. Kelsen: *Der soziologische und der juristische Staatsbegriff*, Tübingen, 1922. Incidentally, with Jellinek, too, the juridical aspect comes first.

eliminated, and in the case of the first he insists that his "pure theory", uncommitted to politics of any kind, is a genuinely scientific theory, and, as such, does nothing whatever either to justify or decry the existing state of affairs. In point of fact, this "social impartiality" is deceptive, just as the rejection of philosophy is always a definite social philosophy, and usually one that seeks to defend the *status quo*.

Kelsen is emphatically against the idea of juridical science paying any attention to the influence exerted on law by morality and to the interaction of these two social phenomena. It is at this juncture that his difference with juridical positivism itself in its 20th-century variants comes into the picture. While reluctant to regard law as being conditioned by the economic base of society and by its class-political structure, this positivism had no scruples about using morality to reinforce the authority of bourgeois law by referring to the close relationship between law and morality (the interpretation of morality was a different matter). The "moral positivism" trend had quite a following among European writers in law; among its disciples were Goodhart in Britain and Ripert in France.⁸⁴ Kelsen, however, stands on the other side of this line. In his system the Ought category is devoid of any moral evaluation.

Among the metajuridical factors which allegedly convert jurisprudence from a science into "juridical politics" and therefore should be prohibited, Kelsen includes also the aims of law and the motives governing the legislator, the social function of the legal norm, in a word, all those points which, in one way or another, could, possibly, be of help in explaining the socio-political sense of the norms of positive law. From the "pure theory" he even excludes the process of norm-making (and the legislative process in particular). "Just as religion summons to life a dogmatic theology which cannot be

⁸⁴ See, for example, G. Ripert, *La règle morale dans les obligations civiles*, Paris, 1925. Ripert's recognition of the important role of moral compulsion in civil law impelled him to conclusions concerning the influence exerted by moral considerations on law as a whole; any seeking for the "external base of law" brings us into the circle of "moral ideas". While morality certainly exerts an influence on law and provides motives for obeying it, the strength of law depends on law itself (in line with the Goodhart view). It is here that we find the distinction between "moral positivism" and natural law.

replaced by psychology or by a religious sociology, in the same way the existence of law engenders its normative theory."⁸⁵ This comparing of his own theory with theology speaks for itself. And, in fact, theology in its own way is actually richer in content since its interest lies not in the logical form of its precepts, but rather in their content and interpretation, including the design for adapting to the ever-changing map of the world of science.

One can easily appreciate that the "elimination principle", to which Kelsen adheres, is simply a further extension of the base of juridical positivism. Normativism, however, is the application of the positivist method in the era of the general crisis of capitalism, and this is a highly important fact. The 19th-century rejection by positivism of the metajuridical approach was largely a spontaneous affair, the consequence of the confidence the bourgeoisie placed in the solidity and endurance of the legal system which, simultaneously, was the embodiment of morality and reason. Kelsen, however, deliberately and consistently adheres to his "elimination principle" at a time when the role and even the fate of bourgeois statehood, law and legality are menaced to a far greater degree not only in theory but also in practice. In these circumstances, normativism is doing all in its power to prevent these questions from even being stated, to depict bourgeois law as being in no way implicated in the socio-political actions and reality of imperialism.

In modern times, when law, as with other vital areas of social life, has become the arena of conflict between the forces of democracy and reaction, when experience has brought us face to face with the problem of law-violating legislation, the thing to be feared in the Kelsenian concept is its social indifference. Kelsen himself had anything but a pleasant time during nazi rule in Germany; in fact, he became a refugee from that rule of terror. His concept, however, caused little, if any, unpleasantness to nazism. Indeed, some of the wildest of nazi legislation fitted into the Kelsenian scheme of things. At first glance one is confronted with the paradoxical situation of a fascist regime which, riding roughshod over the very principle of law and legality, could

⁸⁵ H. Kelsen, *Théorie pure du droit*, Neuchâtel, 1953, p. 84.

not be condemned from the standpoint of a theory claiming to be the most perfect of all possible legal theories.

Clearly, Kelsen commits a logical absurdity when, from the fact of the existence of legal enactments of an unjust, amoral and inhuman nature, he infers that any social evaluation of law is a total impossibility. But surely it is precisely our experience of the kind of law and legality just mentioned that lends emphasis to the crying need for such evaluation. Its absence plays straight into the hands of those who dream of using the legal forms for anti-democratic and reactionary purposes. In Soviet legal writing the Kelsenian view is characterised as the theoretic substantiation of the legal forms by means of which legality itself could be destroyed.⁸⁶

Positivism approached law empirically and undertook to explain its content. The investigation of specific legal material, the inferring of general principles by the method of induction is an important principle of positivistic methodology. Normativism, likewise, which singled out law as its very own isolated object, concentrates not so much on the actual content of the operative law, but rather on the logical form in which the norms find expression. The effect of this intensive whittling away was a law stripped bare of everything but its logical pattern; in relation to the norm this is its logical means of expression, in relation to the legal system as such, it is the logical hierarchy of the sources of law.

The methodological base of the "elimination" process and of its "logical purity" derived from neo-Kantianism—the second source of Kelsen's normativism.

For neo-Kantianism, the object of science, that is, reality, is something passive and amorphous, a situation which needs remedying by way of rules and categories which are of an *a priori* nature and can be introduced into reality by the subject, the knower. Neo-Kantianism is primarily concerned with these *a priori* categories and only secondarily, and in their light, with the objective reality to which they apply.

This, too, is the chosen Kelsenian model. He holds, moreover, that it is not the object that determines the methods of study but, on the contrary, the application of the methods

⁸⁶ See S. L. Zivs. *The Crisis of Bourgeois Legality in the Modern Imperialist Countries*, Moscow, 1958, p. 109 ff (in Russian).

of cognition that determines the object. In his view, the natural sciences are not necessarily the sciences that study the laws of nature; the natural sciences are those that use the category of causality for regulating reality. For example, sociology in Kelsen's view can be regarded as a natural science. But legal practice is a normativist science. Legal science regulates, introduces order into reality with the aid of another initial logical category. The "...principle according to which the natural sciences describe their objects is causality; the principle according to which the science of law describes its object is normativity."⁸⁷

What Kelsen means here is not normativity as a property of the legal norm, as distinct from the individual precept, but as the methodological principle of legal studies (incidentally, Kelsen talks mainly about "describing law").

So how are we to understand his "principle of normativity"? Briefly, Kelsen reasons approximately as follows: the legislator in his obligatory prescriptions equipped with sanctions may proceed from any motives. But the moment thought (that is, science) undertakes to regulate this material, it arms itself with the "Ought" category, and the legal materials assume the shape of a logical directive (judgement); "if there is A, then there ought to be B," that is, if the conditions are such, the consequences (sanctions) linked by the copula "Ought" must be such. This formula linking phenomena by means of the "Ought" is described by Kelsen as "imputation". Making a distinction between imputation and causality, he goes on: "the crime is not the cause of the punishment nor is the sanction the result of an unlawful act. . . . Responsibility is a consequence of the norm."⁸⁸

The norm, undoubtedly, plays a major part in determining the consequences, given a certain case. But what is equally certain is that the legal norm has its source in the desire to exert influence on the actual causal connections. The norm does not abolish these, it merely attaches to them certain legal consequences. The cause of the punishment of a criminal is but the fact of his having committed a crime, not the norm.

⁸⁷ H. Kelsen, *The General Theory of Law and State*, p. 46.

⁸⁸ H. Kelsen, *Théorie pure du droit*, p. 19.

Typical of Kelsen is his persistence in trying to remove the causal connection from the vision of legal science. Causality is possible, he says, only in the world of natural, mechanical phenomena (including those in which the individual as a natural, physical body takes part), but here, too, it is seen as an *a priori* concept, a method of thinking brought into nature by reason. With free will predominant in society, and since we have no notion of how things will actually turn out, all that legal science can say, according to Kelsen, is how, in terms of the norm, things ought to be; that is, it must be restricted to describing the legal obligation, which does not depend on whether or not it is put into practice. The description takes the form of "legal propositions", that is, hypothetical judgements based on the principle of imputation.

Thus we have the three main "methodological instruments" with which Kelsen describes law isolated from its metajuridical admixture. First of these is his imputation, designed as a counterweight to causality; second is his "Ought" category as against the "Is", and, lastly, comes the legal proposition or the hypothetical judgement of obligation, used by legal science to describe its object.

It should be emphasised that the "Ought" as used by Kelsen, has nothing to do with moral obligation. As envisaged by Kelsen, its meanings are many. According to K. Leiminger, one of his critics, Kelsen himself has given the figure of eighteen non-corresponding meanings.⁸⁹ In one thing, however, Kelsen is consistent, the "Ought" of his "pure theory" is never identified with moral obligation. With him, "...the problem of law, as a scientific problem, is the problem of social technique, not a problem of morals".⁹⁰ The "Ought" in the Kelsen system is not an ethical idea, it is a category of transcendental logic. With Kant, it will be recalled, the transcendental was associated with the *a priori* forms of experiential cognition.

This feature of the transcendental logic has an importance all of its own. No fault can be found with the actual process

⁸⁹ K. Leiminger, *Die Problematik der reinen Rechtslehre*, Stuttgart, 1963, S. 63-66.

⁹⁰ H. Kelsen, *The General Theory of Law and State* p. 5.

of setting out the legal norm in the shape of a logical construct with the "Ought" copula, that is, if the logic generally and the logical category of the "Ought" in particular are understood materialistically, in the sense of being based on a really objective "Is", which exists and is reflected in the logical constructs. This posing of the problem confronts the science of law with the task of explaining the legal "Ought" as the reflection of the objective social relations between people, and of showing how it, in turn, exerts an influence on these relations. Kelsen, however, opts for the *a priori* "Ought" category independent of the objective reality. This category is introduced into law, as it were, by the consciousness and, more important still, serves the purpose of isolating law from the world of social being, since for neo-Kantianism the whole logical construct of the "Ought" constitutes the special realm of the normative, which is cut off from the real world of the "Is" and differs basically from it.

Much effort was expended by Kelsen in asserting the existence of an "insuperable dualism", a great divide, between the normative statement of what ought to be, and all the other judgements which merely describe what has taken place or is about to take place. According to Kelsen, this antithesis is given to us by rational thought based on logic in the shape of an insuperable dualism. The statement that something is does not give grounds for saying that it ought to be and, similarly, the statement that something ought to be does not signify that it is. Why this is so Kelsen does not explain. Evidently, as a neo-Kantian postulate, it is to be taken as an article of faith.

From this, however, it follows that the legal propositions, in which science must describe its subject-matter, cannot be verified by turning to the physical world. The "pure theory" rules out such a criterion of knowledge as practice.

Kelsen grants that the basic feature of any judgement, that is, its being true or false, is not applicable to the norm as such. In works written in the 1950s, he emphasises that the norm, being the product of the will of the legislator who pursues a certain goal, can only be effective or ineffective. On the other hand, the legal propositions, that is, the hypothetical judgements in which the science of law describes the

legal materials, can be true or false.⁹¹ (We might add here that this fact was noted by Soviet writers years ago).⁹² But the point is that it is almost impossible to see the slightest difference between the legal norms as such and their description, given as prescribed in the "pure theory". Nor can it be otherwise, since the function of science is reduced solely to reproducing the logical form in which the norms find expression. But to return to the example of the proposition provided by Kelsen himself: "If someone commits a robbery he must undergo punishment." In what way does this legal statement differ from the description of the norm? we may ask. Is it or is it not a fair description of the legal norm, but given even its complete coincidence with the norm, the further question of the truth or falsity of the particular judgement becomes every bit as senseless as the manner of its application to the norm itself. Yet it is precisely here that Kelsen sees a fundamental "logical distinction" between them.

It is not national legal systems but law generally that is the object of "pure theory", Kelsen stresses. In principle, one could agree with this, it is an approach with which Marxism is in harmony. It is extremely important, however, whether we see the dialectical linkage of this general with the particular, or whether the general appears as a factor separating the particular from the whole? All legislation, we are told by Kelsen, has such rules as: if a crime is committed, the consequence is punishment; or the seller must hand over to the purchaser the articles bought by him. From these examples he reaches the conclusion that if one is to remain within the sphere of law generally one should not advance beyond these logical formulas a single step, since they and they alone constitute the general. "Law in general" is reduced to the logical expression of an abstract legal form. Adhering to his neo-Kantian *a priori* method of regulating the reality, Kelsen moves away from the method fundamental to science of ascending from the particular and the specific to the general, and does the same thing on the return journey from the general to the particular, with the result that his "law in

⁹¹ H. Kelsen, *Reine Rechtslehre*, S. 72 ff.

⁹² See, for example, I. D. Levin, "Law and Logic", *Izvestia AN USSR*, Department of Economy and Law, No. 1-2, 1944.

general" remains fixed in the mould of an abstract legal form.

It follows, then, that normativism goes much farther than the other positivistic trends in constricting the subject-matter of legal science. Kelsen would like to see his general theory as something in the nature of the algebra of legal studies. It was this that prompted Pašukanis to describe normativism as the juridical analogue of the so-called mathematical school in bourgeois political economy.⁹³ The parallel, however, is somewhat overdrawn, for the original economists of this school (for example, Walras) used the mathematical method chiefly for expressing the quantitative aspect of economic processes. With normativism, however, analysis based on quantity relationships if it ever did take place, did so only on rare occasions. This trend, unlike mathematical school, which really used this method in examining the economic functions of supply and demand, etc., never subjected to differentiation and integration a single legal function of any kind.

B. Law, Legality and the State in the Normativist Concept

Kelsen invests the concept of law with a much broader content than the displaced, older positivism did. With Kelsen, law, in the objective sense, is not only legislation and other normative acts of the state, which he classes as "general norms"; it is also the so-called "individual norms", such as agreements and contracts concluded between parties, administrative acts, court decisions, etc. He strongly objects to any description of the norm as a rule of obligatory behaviour on the grounds that the term "rule" implies a general prescription. In his view, one can speak of law only in terms of the norm, since a norm may be both general and individual. Whether the law concept should embrace both the general norm issuing from the state and the specific individual norm is not his concern. The whole purpose of his structure is to secure, under the guise of individual norms, the inclusion in positive

⁹³ E. B. Pašukanis, *General Theory of Law and Marxism*, pp. 28-29 (in Russian).

law not merely of the results of the norm-creating function of the state, but also contracts, administrative acts, court decisions and even one-party transactions such as wills.

With this wide-ranging interpretation of law in the objective sense, Kelsen moves away from positivism and, in effect, aligns himself with the trend he had previously criticised, namely, the sociological school, whose adherents hold that state norm-making is but a small part of that elastic "living law" which also embraces court decisions, the factual legal relationships, and so on. Kelsen also dissolves positive law into related but not wholly identical legal phenomena.

Associated with this is his identification of the concept of law and that of the public order. The terms, in the Kelsen view, are synonymous. His "pure theory", he claims, is free from the dualism of objective and subjective law. This is true enough, but is there any real need to overcome this dualism? At any rate, it has proved to be a costly affair for Kelsen. On the one hand, the diffusion of law, in the objective sense, among all legal phenomena cannot but lead, as we shall see, to the possibility of a departure from the principle of legality. On the other hand, the category of the subject of law, regarded as the "personification of the legal norms" that predetermine its rights and obligations, loses all its independent and civil significance. As noted by Bratus, Kelsen's normativism eliminates the last vestige of any real content from the subject-of-law concept, reducing it to a mere law-and-order aspect.⁹⁴

We note, too, that this broad interpretation of law as a synonym for the law and order confounds still more the problem of "social indifference" (that is, the impossibility of any social evaluation of law) engendered by the positivist method. Whereas in affirming that the law should be taken as it really is, positivism had in mind legislation, with Kelsen the role that law played for positivism can be played by any legal norm. In other words, Kelsen's social indifference is extended not only to the legislative sphere but, in effect, to the entire sphere of law including court decisions, administrative acts and contracts, concerning which the science of law

⁹⁴ S. N. Bratus, *Subject of Civil Law*, Moscow, 1950, p. 27 (in Russian).

is not permitted the right to express judgement in the economic, political and moral categories.

As we have said, for neo-Kantianism the "Ought" connection between the phenomena of objective reality is introduced *a priori* into reality by the consciousness. The "Is" and the "Ought" are two separate worlds. The "Ought", while independent of the "Is", nevertheless exerts influence on it. The norm of law, likewise, is none other than an "Ought" connection. Consequently, from the standpoint of neo-Kantian normativism the whole broad Kelsenian understanding of law (the legal order) proves to be in the world of "Ought".

The very existence of law is an existence of a special kind, since the "Ought" is separate from the "Is". It is something that does not resemble being in its usual sense, it is the special "being of the 'Ought' ". According to Kelsen, the legal norm finds its "ideal existence in the 'Ought' " ⁹⁵. It is not surprising that the phenomenological school, with its ideal "eidetic" existence of the legal norms, emerged from normativism. This school held fast to the spirit of objective idealism. The neo-Kantian Kelsen has always asserted that Husserl never influenced his thinking in any way. Be that as it may, his epistemological "ideal existence of the norm in the shape of the "Ought" has little to distinguish it from Husserl's ontological ideal existence of norms and basic legal concepts. In both cases, law, although it too exerts influence on the "Is", exists independently of it in its special being.

In the 1950s, Kelsen, upholding this view in a polemic with Marxism, professed his total disagreement with the basic Marxist view of law as reflecting the system of social relationships, and, in the final analysis, the production relationships too. He recalled, in particular, the afterword written by Marx for the second edition of *Capital* with its reference to the all-important distinction drawn by Marx between his own dialectical method and that of Hegel. For Hegel, "the process of thought", the "idea" was the great "demiurge"; for Marx, "the ideal is nothing else than the material world reflected by the human mind, and translated into forms of thought." ⁹⁶

Kelsen finds this to be a "naive, epistemological view, to-

⁹⁵ OZOR No. 1-2, p. 120.

⁹⁶ K. Marx, *Capital*, Vol. I, p. 19.

tally inapplicable to the world of law, although sound insofar as it applies to the natural world."

Upholding his idealistic view of law as being independent of the physical world, Kelsen claims that in the sphere of law, contrary to Marx, the ideal is not the reflection of the material, but that the opposite is true—the material is the reflection of the ideal. The real behaviour of people, he argues, must conform to the norms of the positive law and, consequently, in the given instance the material (people's behaviour) will be determined by the ideal.⁹⁷ In other words, for the purpose of demolishing the materialist view of law as a specific form of reflection of social being Kelsen substitutes for the question of the norms of law as the reflection of social reality an entirely different question—that of the reflection of the functioning (positive) legal norms in people's behaviour and consciousness.

If, however, the norms of law, taken separately or together, as the legal order, are independent of reality, the question is: how are they determined, whence their source? To this Kelsen replies in neo-Kantian terms: "Ought" is deduced solely from "Ought", norms are defined solely by other norms. Contracts and the other individual norms derive their effectiveness solely from law with its more comprehensive rules of behaviour, law in the constitutional norm, and the constitutional norm (if we step outside the boundaries of the national law) derives its effectiveness from the norms of international law.

To enclose his system within the confines of the abstract-logical world of the "Ought" and to dispense with any seeking for a source of law outside the legal system itself, Kelsen advances the concept of a certain "basic norm"—the topmost rung in his hierarchic ladder of legal norms. This basic norm, we are told, is not deduced from any of the other norms; on the contrary, all other norms are deduced from it. The "binding force of the basic norm is self-evident, or at least is presumed to be so. . . . It is not created in legal procedure . . . it is valid because it is presupposed to be valid, and it is presupposed to be valid because without this presupposition, no human act could be interpreted as a legal, especially as a norm-creating, act."⁹⁸

⁹⁷ H. Kelsen, *The Communist Theory of Law*, pp. 14-15.

⁹⁸ H. Kelsen, *General Theory of Law and State*, pp. 112-16.

If we take the hierarchic theory in its national-law aspect—all the way from the first or lower norm to the highest—the constitution, it will be seen that it reflects, true in somewhat obscure fashion, the actual hierarchy of law sources. This hierarchy, however, is the result not of the self-manifestation of the "Ought" category, but of a combination of factors rooted in the material and political life of society and reflected in the structure of the state mechanism. The hierarchy of law sources is established depending of what role and significance the bodies responsible for the given sources of law are allotted in the system of state bodies according to the constitution. Since the hierarchy of law sources is determined by the hierarchy of state bodies, it cannot be regarded as a system constructed by means of formal logic and deducing law from law itself, which is what Kelsen claims, relying on Merkl's hierarchic theory.⁹⁹

In taking the hierarchic theory beyond the state boundaries, Kelsen not only gives a fundamentally wrong solution to the problem of the relationship between international and national law, making one subordinate to the other; he also creates an obvious imbalance between the logical and the historical in asserting that international law is at an earlier stage in its development than the national law. (Incidentally, neo-Kantianism does not insist that logic and history should coincide.)

The prize piece of mystification in Kelsen's hierarchic theory, and indeed in the entire Kelsenian concept, is his basic norm.

As mentioned previously, his "basic norm" is the thought construct which completes his system. The system begins with the thought category of the "Ought", and its culminating point cannot be reality (Kelsen's greatest fear) or any ideal form in the spirit of neo-Platonism, or simply fideism (since he claims for himself a positivistic-empirical standpoint). And if his basic norm is designed as an insurance against any contact between the "legal order" and the real world (law conditioned by the system of social relationships), then by its very essence it proves to be that element in his system which, more than any other, brings its idealist nature into clear relief.

⁹⁹ I. Szabo, *Socialist Law*, Moscow, 1964, p. 162 (in Russian).

When Kelsen, in his article "Justice and Natural Law", criticised the views of Thomas Aquinas, and when, in particular, he noted that theology, in view of its metaphysical premises, could not be regarded as a scientific teaching, his neo-Thomist opponents who mounted an attack against him found ample ammunition chiefly in his basic norm. "What is implied by the term scientific doctrine? Is it a doctrine based only on facts? If so it is to be feared that few doctrines would qualify for the title 'scientific', and they would not include the Kelsenian doctrine which, for the purpose of substantiating positive law, hastened to invoke the hypothetical basic norm. . . . In the given instance, what benefit would accrue, say, to the atheist by distinguishing between the hypothesis and God? None whatever! For the atheist the presupposition of a system of law based on the hypothesis of a supreme being or of a basic norm is one and the same operation."¹⁰⁰ Certainly the author of this statement is not lacking in logic.

Some Austrian jurists of neo-Thomist sympathies who greatly esteem Kelsen, including his erstwhile supporters who set the tone, suggested the idea of fusing the "pure theory" and natural law; this, they believe, would enable the latter to take the place of the basic norm.¹⁰¹

Kelsen writes: "The content of the positive legal order is wholly independent of the basic norm . . . the only thing that can be deduced from the basic norm is the validity (*Geltung*) but not the content of the legal order." But since Kelsen himself has repeatedly defined the basic norm as a

¹⁰⁰ A. Brimo, *Les grands courants de la philosophie du droit et de l'état*, Paris, 1968, p. 62.

¹⁰¹ R. Marcic, "Das Naturrecht als Grundnorm der Verfassung", *OZOR* No. 1-2, 1963, pp. 69 ff.

Accordingly, Marcic introduced the natural-law concept into this new system; in his view, this concept is "a special aspect of the order of being", which makes possible both the existence of positive law and its cognition. Kelsen, while rejecting the Marcic suggestion, stated that in recent years he had, rather regretfully, taken another look at the basic norm. That, however, was as far as things got. Kelsen merely repeated that the "basic norm" was not a norm in the strict sense since it was the product of an act of thinking, not of volition, that it was no more than a transcendental-logical condition enabling one to think of law in terms of a "pure system" (*ARSP* No. 4, 1966).

"thought function", as a "hypothetical condition", etc., the reader can hardly be blamed for thinking that, according to Kelsen, law, throughout the centuries of its existence, found its validity not in the social factors, not in the universally imposed will of the ruling classes, but in a fiction and a "hypothetical condition".

Kelsen's hierarchic theory enables him to keep up with the other leading bourgeois schools in making a case for free judicial discretion. In this respect, he breaks decisively with positivism, without, however, any declaration to that effect. The positivist view is that the judge, interpreting the law as it applies to the particular case, is acting in keeping with the law. Kelsen, on the other hand, believes that this is an archaic view. According to his hierarchic theory, the judge himself, in the act of delivering judgement, creates the norm. In the hierarchic theory as developed by Adolf Merkel the pure theory shows that the function of the judge is not to adhere to any earlier established and stated law, but rather to continue the process of law-creating, that the judge, like the legislator, is a participant in norm-creating; he makes the norm, a real individual norm, as distinct from the general norms established by the legislator.¹⁰² Had Kelsen confined himself to regarding the judge's decision as an individual norm, all would have been well. But here, too, he invests the judge with an exceptionally wide-ranging competency in decision-making. Any higher normative source (for the judge, the source found in law) can only be the general frame within which it is possible to find a plethora of decisions, all of them of equal jural value and significance.¹⁰³ In other words, the judge can deduce from the law a multiplicity of sound judgements. In practice, this amounts to nothing less than freedom of judicial and administrative discretion.

The distinction between the "pure theory" and sociological jurisprudence, on the one hand, and the "revived" natural-law doctrine, on the other, is simply that Kelsen never thrusts into the foreground the judge-law relationship, never condemns the law in praising the judge but, in a somewhat

¹⁰² OZOR No. 4, 1953, p. 474.

¹⁰³ H. Kelsen, *Reine Rechtslehre*, S. 349.

furtive way, in the guise of a teaching which interprets the legal norm in the light of his "hierarchic system", arrives at the same desired results. Even in Western writing on the subject, the point is made that, while appearing to interpret legal norms, Kelsen arrives at conclusions which have little in common with interpretation in the ordinary meaning of the word, that in reality he is not concerned with explaining the purpose of law and its content with a view to its precise application; his sole concern is with substantiating judge-made law.¹⁰⁴ This licensing of the judge and officialdom to make law at their discretion is furthered by the fact that normativism denies the possibility of gaps in the law, authorises the interpretation of legal norms at all levels (and not only by the body issuing these norms), objects to any counterposing of law-creating and law-application and attempts to merge these two concepts.¹⁰⁵ Heretofore the view has been that doctrinal interpretation allows for much greater freedom and range than judicial interpretation, the explanation being not simply the role allotted to the judge in the state structure, but also the social function of the science of law in the everyday life of developed societies. In Kelsenian theory, however, we have the opposite: the court looms much larger than doctrine. The judge, creating the individual norm, expresses thereby his attitude to the law. Doctrine, on the other hand, according to the "pure" methodology, cannot allow itself anything of the kind. The judge can modify the individual norm, since, as we have seen, he is entitled to deduce a variety of judgements from a higher-ranking norm and they will all be legally valid. In creating another norm on the basis of one and the same law, the judge is also expressing his attitude to a previous individual norm. The science of law, however, cannot allow itself to express its attitude to a court decision, since the decision is a norm (although an individual one) and, consequently, science can only describe it. The science of law cannot decide which of the possible individual norms in the given case is

¹⁰⁴ See, for example, K. Leiminger, *op. cit.*, S. 92.

¹⁰⁵ In the view of R. Walter, legislation is, simultaneously, the constitution in action, and judge-made law, likewise, signifies law-creating. See *Der Aufbau der Rechtsordnung*, Graz, 1964, S. 45.

the correct one, since in this case instead of being "pure theory" it would immediately become legal politics. Thus, legal science is deprived of the opportunity to submit its evaluations not only of legislative but also of judicial and administrative practice.

From the Kelsenian teaching on the state we shall examine one aspect which comes directly within the range of our study, namely, the law-state relationship. Incidentally, if we were to follow the Kelsen example, we would find it impossible to say anything at all about this relationship because Kelsen does not correlate the two, but identifies them. Of all the possible approaches to the subject of the state, the basic approach, that which discloses its nature, is, for him, the juridical and, from this standpoint, the "problem of the state appears as the problem of the national system of law". The state is seen as the personification of this legal system, or as this same legal system viewed in a particular light.

A glance at some of Kelsen's statements on the subject will show how he "overcomes" the state-law dualism. "...There is no sociological concept of the state besides the juristic concept. Such a double concept of the state is logically impossible, if for no other reason because there cannot be more than one concept of the same object. There is only one juristic concept of the State: the State as centralised legal order."¹⁰⁶ And further: "That the State must be a normative order is obvious also from the conflict between State and individual. . . . If the State were an actual fact, just as the individual is, then there could not exist any such conflict since 'facts' of nature are never in 'conflict' with each other. But if the State is a system of norms, then the will and the behaviour of the individual can conflict with these norms, and so can arise the antagonism between the 'Is' and the 'Ought', which is a fundamental problem of all social theory and practice." And again: "The result of our analysis is that there is no sociological concept of the State different from the concept of the legal order, and that means that we can describe the social reality without using the term 'state'."¹⁰⁷

¹⁰⁶ H. Kelsen, *General Theory of Law and State*, pp. 188-89.

¹⁰⁷ *Ibid.*, p. 192.

We have deliberately reproduced these excerpts *in extenso* in order to provide yet another illustration of Kelsen's famous methodology in which it is not theory which corresponds to the social reality, but the social reality which has to correspond to a pseudo-logical construct. In the final analysis, this Kelsenian indentification of state and legal order (that is, law) derives from hypertrophy and the interpretation in pure theory categories of two real features of statehood.

One of these features is that compulsion, being a specific feature of law, is carried out by the state organs. If this interconnection is divorced from all the other interconnections between state and law (for example, the state's law-creating activity), the impression could be gained—and this is just what Kelsen tries to achieve—that the state, by its effecting compulsion, becomes nothing more than the logical continuation of law. The error of this thinking is obvious from the simple fact that state compulsion may be effected also in non-legal ways, and history, including the history of capitalist society, is filled with examples of this.

The other feature is that the actual organisation of the machinery of state necessitates juridical formulation and, in this sense, functions as a definite legal order. Moreover, the legal-order concept can be extended to the point of emerging as a juridical aspect of the political organisation of society as a whole, including its non-state elements. It is this legal order, as a specific attribute of statehood, that engages the special attention of the science of state law. There are no grounds, however, for reducing the state to the legal order as such. This is wrong, first, because the legal order (or system) in developed class societies embraces and expresses not only the political, but also the economic and many other social relationships and is, therefore, more wide-ranging than the legal aspect of the state as such. On the other hand, the state should not be reduced to its legal aspect. Its social aspects are multiple. As a comprehensive social phenomenon it has its sociological, political and other features.

The Kelsenian affirmation that the juridical concept of the state rules out any sociological concept, since there cannot be more than one concept of the object, is every bit as mistaken as, for example, the statement that the physical description of water rules out its chemical description. The

concept of the state is one thing, but its essential attributes are numerous and varied, and given a proper method of study, none of these essential qualities exclude the other; as a rule they supplement one another. Basically, the very distinction between juridical and sociological aspects is somewhat formal, since in the world of reality the juridical is simultaneously the sociological.

Kelsen formulates an utterly false logical dilemma: If the state is not to be regarded as a legal phenomenon and does not relate in any way to a normative order, then, clearly, it must be seen as a natural phenomenon. But this is nonsense. In reality the social cannot be reduced to the normative. The normative is not a necessary precondition for social conflicts. Historically, on the contrary, law itself made its appearance on the scene as the result of social conflict, of class antagonisms.

Attempts to interpret the Kelsen construct of the law-state relationship as a liberal variant of the "legal state" simply cannot be substantiated. R. Marcic, in a jubilee symposium in honour of Kelsen: "For the *Meister* law and state are one. Every state is a rule-of-law state. Is this a justification for the rule-of-force state? Not at all. This identifying doctrine has an entirely different purpose—a state is a rule-of-law state or it is not a state at all, it is merely an apparent state. Any act of state is a genuine act of state only insofar as it is a legal act; every state organ is a genuine state organ only insofar as it is a legal organ; every state function is a genuine state function only insofar as it is a legal function."¹⁰⁸

The idea that state organs and acts should be of a legal nature is sound in principle and, in any case, is far from new. As for the Marcic concept of the "apparent state", this is nonsense, since it implies in Marcic terms ("any non-legal state is an apparent state") that his statement could apply to the nazi Reich, fascist Italy, to the feudal absolute states, and so on. Have we not had too many "apparent" states in the long history of statehood?

In the Kelsen theory there is no mention whatever of an

¹⁰⁸ *Law, State and International Legal Order*, ed. by S. Engel and R. Metall, Knoxville, 1964, p. 205.

"apparent" state, as opposed to the rule-of-law state, and the "monism of law and state" is something quite different from the idea of the "rule-of-law state". Just as law in his system is any law defined not by its content but solely by its formal attributes, so the state is any centralised legal order. Thus the nazi state, according to Kelsen, is just as much the personification of law as the democratic republic. This characteristic and dangerous feature of the "pure theory" has been noted even by his disciples. A. Merkl, for example, whom Kelsen calls one of the founders of the normativist teaching, observes that Kelsen, in identifying state and law, proceeds from the purely formal attributes and not from the content of law. As distinct from liberalism, Merkl goes on, which insists on legal limitation of the state with regard to the content of its activity, the implication of the Kelsenian doctrine is that the state as the personification of the "legal order" always functions in legal forms, but in doing so can act as it pleases.¹⁰⁹

In this aspect of the Kelsen teaching there are unmistakable totalitarian overtones, and especially at moments when the reactionary forces seek to attack democracy with a semblance of formal observance of law.

The correct thesis—the reverse of Kelsen's—is that not every act of state is given legal form, but the state itself is by no means entitled to do everything it thinks fit.

C. The Kelsenian Falsification of Marxism

We have referred frequently to Kelsen's *The Communist Theory of Law* and to his appetite for making political capital out of anti-communism. How, exactly, does he interpret the views on law to which the founders of Marxism subscribed? His favourite gambit is the immanent criticism of Marxist teaching, the attempt to find in it contradictions and inconsistencies that would allegedly expose its lack of intrinsic logic.

His first broadsides are delivered against the Marxist concept of basis and superstructure. In place of the Marxist

¹⁰⁹ OZOR No. 1-2, 1963.

definition of the basis as the aggregate of the production relations in the given society, Kelsen comes up with an alleged synonym for the Marxist concept in the shape of the "social reality". This is followed by highly selective references to the state by Marx and Engels to the effect that it (the state) is the objective factor of social life, or to law as a form of reflection of the existing economic relationships, after which he goes on to assert that, as part of the "social reality", both state and law should be qualified as the basis. In particular, quoting from Marx's *Critique of the Hegelian Philosophy of Right* to the effect that the state engendered a definite ideology of which the speculative philosophy of right is an expression, he hastens to announce that here the state is seen as the "social reality", engendering a specific ideology, and regarded by Marx as the basis.¹¹⁰ Then, turning to the passages in Marx and Engels in which the state and law are referred to as ideological phenomena, he claims to have discovered an unnatural contradiction between the Marxist view of state and law as, on the one hand, "social reality" (which, he argues, signifies their being assigned to the basis) and, on the other, as ideology, that is, superstructure.

Next comes a distortion of the Marxist definition of the superstructure. Whereas for Marx the superstructure was the juridical and political superstructure plus the forms of social consciousness, in Kelsen's interpretation the superstructure is only the forms of social consciousness. Then follows the conclusion that, from the position taken by Marx, both state and law will figure as superstructure only if they are regarded as forms of social consciousness, as "ideology" in its pure form. He declares that to assign state and law to the superstructure is tantamount to confusing the reality of state and law with political and legal ideology. Marx and Engels, he argues, confuse law with legal views. "If we examine why Marx considers the law as an ideological expression of economic reality, we see immediately that it is not the law but a certain theory of the law which he had in mind... If Engels, in other connections, designates the

¹¹⁰ H. Kelsen, *The Communist Theory of Law*, p. 7.

law as an ideology, he identifies law with a distorting theory of the law," writes Kelsen.¹¹¹

Marx and Engels, having in mind the historically concrete forms of ideology (for example, religion, juridical outlook, and so on), frequently referred to these forms as complex, illusory, topsy-turvy reflections of the material world. On these grounds, Kelsen claims that for Marx and Engels ideology was always a false reflection of the social reality. Since he claims that Marx identifies "superstructure" and "ideology", and likewise ideology and law, then law, as depicted by Marx, is an illusory and immature ideology, whereas the correct views and their representation in the Kelsenian interpretation of Marxism do not figure at all in the superstructure. This leads him, let it be said, to yet another of his absurd conclusions, this time to the effect that, according to Marxism, in the communist society of the future, in which social being will find its correct reflection in the social consciousness, there will be no superstructure at all.

Thus, Kelsen quite clearly has failed to arrive at even an elementary understanding of the Marxist teaching on basis and superstructure, of the interrelations of economic basis, law and ideology.¹¹² Were it not for the fact that one of the elements of this "immanent critique" has had a fairly wide circulation, it would hardly merit our attention. Influenced, evidently, by the Kelsen view, C. Friedrich, A. Verdross, S. Stumpf and other Western writers on the subject argue that in the Marxist teaching law is regarded chiefly as a "class ideology".¹¹³ Since the concept of ideology appears here as a distorted reflection of the real world, it will readily be seen that what the reader is offered is the mixture as before, namely, that Marxism attaches little value to law.

Certainly, law is an ideological phenomenon; it is moulded under the influence of the prevailing ideology of the day,

¹¹¹ H. Kelsen, *The Communist Theory of Law*, pp. 12-13.

¹¹² For details see I. Szabo, "Hans Kelsen and the Marxist Theory of Law". In: *Magyar Indományos Akademia. Az allaur es Jogtudományi Interet Ertesítője*, I Kotet, No. 1.

¹¹³ C. Friedrich, *The Philosophy of Law in Historical Perspective*, Chicago, 1963, p. 143; A. Verdross, *Abendländische Rechtsphilosophie*, Wien, 1963, S. 165; S. Stumpf, *Morality and the Law*, Nashville, 1966, p. 51.

and is the result of conscious, volitional action, whereas social relationships in their legal form (including the form in which the law records them) are ideological relationships, distinguished by Marxist theory from the material social relationships. But this gives no grounds whatever for identifying law with ideology, for regarding it as a form of social consciousness. Law is a special social phenomenon the chief function of which is to regulate social relationships and influence people's behaviour; it may also be regarded as a method of carrying out the functions of society and state. On these grounds alone, to say nothing of the fact that law cannot be understood in isolation from its complex mechanisms of everyday realisation and application, it may be concluded that the essence of law lies on a different plane from ideology as a form of social consciousness. The Marxist view is that one can speak of law as being ideological, that is, of having passed through the minds of people, as an expression of definite socio-economic relationships. But by no means does this signify that the state and law become ideology. Marxism makes a clear distinction between the concept of "ideological phenomena" (ideological relationship) and "ideology". Marx, for example, referred to the state, to law, morality and religion as forms of ideological alienation, but that did not prevent him from affirming that "religion, family, state, law, morality, science, art, etc., are only particular modes of production, and fall under its general law."¹¹⁴ We recall, too, that in his preface to *A Contribution to the Critique of Political Economy* he clearly distinguished between the political and legal superstructure, on the one hand, and the forms of social consciousness, on the other.¹¹⁵

True to his method of not leaving any criticism of his writing unanswered, Kelsen never tires of complaining of the misinterpretation of the "pure theory" in Marxist literature.¹¹⁶ He refers, in particular, to two postulates in the

¹¹⁴ K. Marx, *Economic and Philosophic Manuscripts of 1844*, Moscow, 1964, p. 103.

¹¹⁵ K. Marx, *A Contribution to the Critique of Political Economy*, Moscow, 1970, p. 20.

¹¹⁶ Actually this is the sub-heading of one of the paragraphs in his book *The Communist Theory of Law*, pp. 142-44.

text-book, *Theory of State and Law*, by Golunsky and Strogovich. Speaking of Kelsen's "pure theory", the authors say that it separates the world of causal connection to such extent from the world of legal norms that observation of the latter is seen as the consequence of their own internal force.¹¹⁷ In this connection Kelsen goes out of his way to emphasise that his concept is not greatly concerned with why the law is or is not observed. "The pure theory of law does not insist that human beings must observe the legal norms, because this is a political, not a scientific function, and the pure theory of law insists on a clear separation of the two functions. This theory knows nothing of an 'internal force' inherent in the legal norms."¹¹⁸ Kelsen also disagrees with the Soviet writers' statements to the effect that having separated the norm of law from the world of reality, bourgeois normativist theory invests law with an idealistic character. Kelsen underlines the last two words and goes on to say that "it is a misinterpretation of this theory [the "pure theory of law"—*Ed.*] which is far from giving the legal norm an 'idealistic character', meaning a moral value.... The Ought in the rule of law has not a moral but only a logical significance. It is just the tendency to avoid any idealisation of the legal norms which is characteristic of the pure, that is the normative theory of law".¹¹⁹

If Kelsen's first rejoinder has an element of justification in the sense that his critics should have been more accurate in setting out his views, his second point is based on a quite unjustifiable substitution of the term "idealistic" used in its philosophical sense by the Soviet writers for the term "ideal", which has an altogether different meaning. But even this is not so important.

Kelsen's argument as a whole, as one can see plainly, is to emphasise the "purity" of his approach to law, its separation both from the world of human action and from moral values. But this "purity is the very reason why Kelsen is criticised in Marxist legal theory; and the criticism

¹¹⁷ S. A. Golunsky and M. S. Strogovich, *Theory of State and Law*, Moscow, 1940, p. 243 (in Russian).

¹¹⁸ H. Kelsen, *The Communist Theory of Law*, pp. 143-44.

¹¹⁹ *Ibid.*, pp. 142-43.

strikes at the very core of Kelsenianism. Pašukanis, drawing attention to Kelsen's eagerness to cling to the formal logical sense of his "Ought" category (Pašukanis perfectly understood this side of the pure theory), reached the conclusion that "such a general theory of law which is not concerned in the least with explaining anything, which from the very outset turns its back on the facts of reality, that is, on social life, and which has to do with norms, without being interested in their sources (a metajuridical matter!) or in their connection with any other material interests, can, of course, claim for itself the designation of theory only in the sense in which one can speak, say, about the theory of chess."¹²⁰

Such conclusions, however, Kelsen prefers to ignore. And so we arrive at a rather curious situation. Marxist theory subjects Kelsenianism to criticism for its "purity". To which Kelsen replies: "No, gentlemen, my theory is much more pure than you imagine."

¹²⁰ E. B. Pašukanis, *The General Theory of Law and Marxism*, p. 15.

Chapter Three
SOCIOLOGICAL JURISPRUDENCE

Marxist theory combines monistically the philosophical, sociological and juridical approaches to the subject of law. The materialism of Marxism provides the study of law with an ontological and epistemological basis which presupposes the need for a sociological study of law—both as a product of and, simultaneously, a vital element in the development of the economic, political, cultural and other areas of social life.

This sociological approach makes it possible to stop worshipping the legal form and bring into the open the real content of the socio-historical types of law and their social effectiveness. This has all provided fertile soil for the juridical analysis of legal institutions and norms as such.

Bourgeois theoretic-legal thinking chose another approach. As we have seen, it began with positivism which, in its adamant way, ruled out the possibility of a metajuridical analysis of law and, at best, offered what might be described as a passive philosophy and a negative sociology. Only at the turn of the century did bourgeois legal thought,

conscious of the inadequacy of positivism, launch out on an active philosophical and sociological exploration. This meant a broadening of its approaches to the subject, due chiefly to the logic of its battle with Marxism and the need to submit its own judgements on those social connections and aspects of law which, while well within the range of Marxist vision, had yet to engage the attention of positivism—the dominant trend in the bourgeois science of law. Thus the so-called sociological jurisprudence appeared on the scene, and there was a “revival” of the philosophy of law, especially of natural law, with the result that these two approaches became the constant companions of juridical positivism.

In this chapter we shall discuss some of the trends in 20th-century bourgeois sociological jurisprudence and, in the next, the philosophy of law.

1. A GENERAL VIEW OF SOCIOLOGICAL JURISPRUDENCE

The bourgeois sociology of law set out on its journeying with pronounced anti-positivistic slogans, turning its back on the general theory of law as a theory of a positivist brand. According to its spokesmen, the starting point and ultimate goal of sociological jurisprudence, as distinct from the general theory of law, is not law as the aggregate of the operative norms but law as a component of the social reality. Ehrlich, in a brief foreword to one of his books, which was a landmark in the development of bourgeois sociological jurisprudence, wrote: “It is often said that a book must be written in such a manner as to permit of its content being summed up in a single phrase. If the present volume were to be subjected to this test, the phrase might read like this: ‘At the present as well as at any other time, the centre of gravity of legal development lies not in legislation, nor in legal science, nor judicial decision, but in society itself.’”¹

It would be true to say that sociological jurisprudence widened the range of bourgeois law studies, and took them

¹ E. Ehrlich, *Grundlegung der Soziologie des Rechts*, München-Leipzig, 1913—Vorrede.

outside the positivistic boundaries. In the social aspect, however, the advance fell considerably short of what its exponents had anticipated.

Nothing very new appeared in the shape of propositions relating to the social function of law, to its nature and its effectiveness. The little that did emerge never overstepped the boundaries of the conventional bourgeois law studies and left but a faint imprint on socio-political thought as a whole.

Long before this, the essentials for a sociological approach to the study of law had been formulated in the clearest terms by Marxism, which enunciated the fundamental social laws of development of the legal superstructure of class society. The point made by Ehrlich, whom we have just quoted, reads, in essentials, almost as a paraphrase of the well-known theses formulated by Marxism much earlier to the effect that law has no history of its own, that it is not the determining factor in the march of society, but, on the contrary, the social relationships act as the determinants of law. As one might expect, the solution of the problems offered by Ehrlich is the opposite of that suggested by Marxism and, what is more, is actually hostile to it, but this does not make his statement of the problem any more original.

The search for a new range of problems was largely of a declaratory nature, since most of the offerings presented as new findings differed, if they differed at all, only slightly from those already common to bourgeois jurisprudence. The reason for this was not merely the narrowness of the social frame in which the studies were conducted; other factors included the social, economic and political conditions first of monopoly capital and, later, state-monopoly capital—the social base of bourgeois sociological jurisprudence. Its basic postulates reflected the incongruity between the legal institutions that accompanied the rise of industrial capitalism and the economic and political processes that came in the wake of monopoly. The political factor that stimulated sociological jurisprudence, was the ever-recurrent crisis of bourgeois legality, as a manifestation of the imperialist bourgeoisie's swing towards political reaction. In a situation of this kind, the solving of the "new problems" yielded little of scientific value and soon acquired a tendentious and, in many respects, downright reactionary socio-political tinge.

N. Timasheff, an American legal expert and sociologist, in his survey of the bourgeois sociology of law over the past fifty years, acknowledged that the progress had not been striking. It had produced nothing dependable enough to warrant inclusion in the main body of sociological theory.² Timasheff nevertheless includes in sociological law several schools which have no direct relationship whatever with it.

Some of the advocates of sociological law busied themselves with a somewhat superficial investigation of its founding fathers. A list drawn up by G. Gurvitch dates its precursors from Aristotle, Montesquieu, Leibnitz and all the way along to Fichte, Proudhon and others.³ True enough, in the writing of these well-known thinkers of the past one encounters both sound and unsound premises and findings useful in interpreting some of the social aspects of law. But, having said that, one must also register complete disagreement with the attempts to depict bourgeois sociological law as the continuation of one of the mainstreams of socio-political thought. Its contribution has been much more modest. It was, in the first instance, a reaction on the part of bourgeois juridical thought to the new social conditions brought about by the change from the old capitalism to the modern imperialism. Nor can it be described as a product of the preceding phase of bourgeois sociology, despite the fact that the influence of the latter on juridical sociology increasingly made itself felt.

If we leave aside for the moment the habit of many bourgeois writers in the first half of this century to attach the label "sociological law" to works which in reality had little to do with sociological approaches, merely on the grounds that they break out of the traditional positivist frame, we can somewhat tentatively suggest three basic but frequently interlocking trends in the sociological jurisprudence of those days.⁴

² *Modern Sociological Theory in Continuity and Change*, ed. G. Becker, A. Boskoff, New York, 1957, p. 448.

³ G. Gurvitch, "Rechtssoziologie", *Die Lehre von der Gesellschaft*, ed. G. Eisermann, Stuttgart, 1958, S. 190-200.

⁴ Among those who wrote in terms of sociological law was, for example, F. Sander (a one-time Kelsen disciple), whose main subject was the juridical-philosophical theses of neo-Kantianism (see A. Verdross, *Abendländische Rechtsphilosophie*, Wien, 1963, S. 195). Concern-

One of these trends is represented chiefly by German writers on the subject—E. Ehrlich, H. Kantorowicz, H. Sinzheimer and others—and, possibly because of their choice of terminology, is known as “the living law” trend, or “law as a system of relationships”. Many aspects of this trend were anticipated by S. Muromtsev.

Another member of the trinity could well be described as the sociological-institutionalist. It has its epicentre in French writing, and especially in the work of E. Levi, G. Gurvitch and H. Lévy-Bruhl. At one moment in its career this trend had much in common with Duguitism and bore some resemblance to law of a sociological-positivistic type.⁵

Lastly, we have a third, sociological-psychological trend, which approaches law from the psychological and behavioural angles and, in treating law as component of the social reality, is chiefly concerned with what Timasheff has called the “bio-psychological reality”.⁶ This trend, reflecting the growing popularity of psychological trends in bourgeois sociology itself, had a fairly considerable following in the United States.

The “autonomous law movement” cannot be regarded as an independent trend in European sociological jurisprudence, although, in saying this we are, of course, aware of the close connection, both in origin and in subsequent development, between the two slogans of the “sociological approach” and the “autonomous approach”. The basic idea of the “autonomous law movement”—greater amplitude for judicial discretion—which subsequently grew into an apologetic for judge-made law, had long been common ground with all the basic trends in bourgeois law theory, and not just sociological jurisprudence. What is more, whereas the

ing B. Horvat's *The Sociology of Law* (in Russian), 1934, Timasheff writes that it is “steeped in philosophy” (*Modern Sociological Theory*, p. 498). For a detailed examination of the Horvat concepts, see P. Popov, *Kritika na s'vremennite burzhoazni teorii za d'rzhavata i pravoto* (Critique of Contemporary Bourgeois Theory of State and Law), Sofia, 1969, pp. 401 ff.

⁵ D. I. Lukovskaya speaks of a French positivist-sociological school (*Pravovyyedeniye* No. 6, 1967). One feels that would be more correct in reverse—“sociological positivistic”.

⁶ *Modern Sociological Theory in Continuity and Change*, p. 424.

pioneers of bourgeois sociological jurisprudence shared and advocated the basic features of the "autonomous law movement", by no means all those who are listed among the movement's inspirers can be regarded as supporters of sociological law. This would apply especially to F. Geny, in whose writing, because of its eclecticism, one encounters Bergsonism, natural law, the "nature of things", spiritualism, and so on, but least of all attempts to see law in terms of sociological categories.⁷ Characteristically, having taken as his starting point and main problem the process of the application of the law, Geny made no attempt to give a concrete sociological description of the bourgeois court. In their studies of the bourgeois sociology of law, men of the stature of Timasheff and Gurvitch tend to ignore Geny's work and, as we have seen, the grounds for their doing so are not wanting.

In bourgeois jurisprudence with its multiplicity of branches the "sociological approach" is also expressed in, for example, the sociological school, which occupies itself with the subject of state law and has made its presence felt in the general theory of law.⁸ Whereas the "classical school" corresponded to juridical positivism in the science of criminal law, the sociological school in all its many variants is one of the main forms of the anti-positivism reaction.

A special place is held by the historico-sociological school. The considerable contribution here may be attributed to the fact that the process of extending British common law to extensive colonial possessions demanded a study of the local law—chiefly custom and religion—which in turn demanded, first, certain premises of a historico-theoretic nature and, second, yielded abundant ethnological and historical material. The view (most pronounced in German writing on the subject) that this unique school was a side-shoot of the historical school in Germany and that its adherents (Sir Henry Maine, for example) were apostles of Savigny, is quite wrong.⁹ Maine, whose views on history were of a somewhat

⁷ A. Brimo refers to Geny as an "eclectic humanist" (*Les grands courants de la philosophie du droit et de l'état*, Paris, 1968, p. 328).

⁸ I. D. Levin, *Modern Bourgeois Science of State Law*, 1960, pp. 58-83 (in Russian).

⁹ For example, A. Verdross in his *Abendländische Rechtsphilosophie*

conservative nature, held that by and large people were reluctant to change existing institutions, and was an opponent of the natural-law doctrine, although he never hesitated to give it credit where he believed credit was due. Maine's conception, however, naive in many ways (he was a firm believer in the patriarchal origins of society), and shortly to be overtaken by the new advances in ethnography, differed fundamentally from that of Savigny. Maine always upheld the vital part played by law and by the law-makers in the evolution of law. The social and political burden of his concept corresponded to the expanding capitalistic relationships of his day. His formula—from statute to contract—which put his whole view of legal development in a nutshell, became famous because it reflected the transition from the hierarchical estate system to free enterprise.

As time went on and with the appearance of men like M. Kovalevsky and P. Vinogradoff, the historical school could, with infinitely greater justification than many others, state a claim to "sociologism". Plekhanov described Kovalevsky as one of the "brilliant representatives of the modern comparativistic study of law", and held that he had a tendency to seek the explanation of the history of law and of society as a whole in the means of production and the state of the productive forces.¹⁰ Kovalevsky, while not a Marxist, was personally acquainted with Marx and Engels and studied their views.

While his general sociological standpoint reflects the influence of Comte and Spencer, his works on history and law contain a wealth of material confirming the dependence of law on the social and economic evolution of society.¹¹

(Wien, 1963, S. 153) writes that "Sir Henry Maine (1822-88), founder of the historical school of law in England, was influenced by Savigny".

¹⁰ G. V. Plekhanov, *Selected Philosophical Works*, Vol. 1, pp. 626-33 (in Russian).

¹¹ See, for example, M. M. Kovalevsky, *Contemporary Custom and Ancient Law*, Vols. 1 and 2, Moscow, 1886 (in Russian); *The Law and Custom in the Caucasus*, Vols. 1 and 2, Moscow, 1890 (in Russian). Engels makes several references in his *Origin of the Family, Private Property and the State* to Kovalevsky's *Primitive Law*, Moscow, 1886 (in Russian), and *Tableau des origines et de l'évolution de la famille et de la propriété*, Stockholm, 1890.

In a reference to P. Vinogradoff's studies of the agrarian history of England which, according to some English authors, revealed to Englishmen their own history, the Soviet historian Ye. Kosminsky wrote: "The greatness of Vinogradoff which enabled him to become leader of the schools of mediaevalists both at Moscow and at Oxford, lay in the thoroughness and the accuracy of his research. His professional skill and mastery of his subject, especially his analysis of the legal institutions and juridical relationships, astonish us with their exceptional subtlety. At times, however, he tends to overstress the juridical structures, which now and then overshadow the actual social relationships. While his skill in analysing situations is amazing, he is less strong in his generalisations and conclusions. At times displaying a correct understanding of the class structure and class struggles in mediaeval society, he, like Kovalevsky, was never able to draw the logical conclusions from his thinking and halted in a state of indecision, when only half way to his goal."¹²

Certainly, Vinogradoff's researches mentioned by Kosminsky and his other historico-legal works imparted a powerful impulse to the sociological approach to the science of law, providing valuable material for explaining its origins and evolution as well as the mechanism of its interaction with the surrounding reality. Vinogradoff himself repeatedly stressed the close dependence of the law on social conditions. Here he is on the subject: "...the evolution of law, as we see, is intimately dependent on the historical and especially on the material conditions in which it functions. But this intimate association is never a slavish one. There is more to law than the conditions to which it is indebted for its existence. Once it has taken shape, it becomes an independent entity, acquires means of its own and becomes, of its own volition, a powerful and vigorous factor."¹³ It is interesting to compare the explanation of the reasons for the reception of Roman law offered by Vinogradoff and that

¹² Ye. A. Kosminsky, *Researches on the Agrarian History of England in the 13th Century*, Moscow, 1947, p. 7 (in Russian).

¹³ P. Vinogradoff, *The History of Legal Practice*, Moscow, 1908, p. 219 (in Russian).

of R. David. In David's view, "the rise of legal systems in Western Europe during the Middle Ages and the process of the reception of Roman law had no substantial association with the world of economics and politics; they were, in fact, the exclusive products of culture".¹⁴ Vinogradoff, who had studied the same subject half a century earlier, explains why the reception of Roman law grew out of political soil and was associated with the functions of the feudal state authorities (David rejects this thesis), underlines the vital importance of economic development in the reception of Roman law and ends by paying tribute to the remarkable quality of the private-law system created by Roman jurisprudence.¹⁵

On the whole, however, as Kosminsky says, Vinogradoff never managed to get beyond the half-way mark, even when he turned away from his historical studies to the general theory of law. In this new area he never arrived at the far-ranging materialist generalisations (at an understanding of the class essence of law), and much of what he had to say about the norm of law, subjective law and the law-morality relationship does not go beyond traditional bourgeois legal theory.¹⁶ The contradictions in his writing are fairly numerous. For instance, he underlines in a variety of contexts the part played by political power and the state in the evolution of law, and pours scorn on those writers who saw judicial authority as being in opposition to political power as a whole (this criticism, incidentally, applies in full measure to the present-day advocates of judge-made law), yet he held that, in defining law, it was not obligatory to associate it with the state, and he upheld the institutionalist formula to the effect that "every society has its own system of law". His concept of stages in the evolution of law is based on generalisation of substantial material from legal history,

¹⁴ R. David, *Les grands systèmes de droit contemporains*, Paris, 1964, p. 37.

¹⁵ P. G. Vinogradoff, *Roman Law in Mediaeval Europe*, Moscow, 1910, pp. 94-95 (in Russian). The fact that Vinogradoff regarded Roman law as an important element in the subsequent evolution of law in continental Europe and in England gives no grounds whatever for referring to him as a "disciple of Savigny", a claim made, for example, by P. Popov, *op. cit.*, p. 100.

¹⁶ P. G. Vinogradoff, *Essays on the Theory of Law*, Moscow, 1915 (in Russian).

but his method of constructing these stages is strongly reminiscent of Max Weber's "ideal types."¹⁷ Politically, Vinogradoff never advanced beyond the pale liberalism of the pre-revolutionary Russian Constitutional Democrats (popularly known as the Cadets), and on these grounds he was criticised by Lenin.¹⁸

The historical-comparativist school is associated with juridical ethnology, to which we now turn. The writings of its leading authorities—Fraser, Post and Malinowski—proceed along strictly ethnographical lines and, unlike Kovalovsky, who engaged in juridic-ethnological research, confined themselves chiefly to the ethnographic, apart from occasional ventures into the general theory of law.¹⁹

It is far from our purpose to decry in any way the importance of juridical ethnology. In point of fact, the role played by ethnological studies in the theory of the state is strikingly evident in one of the fundamental works of Marxism—*The Origin of the Family, Private Property and the State*. And we recall, too, that seven years after its publication Engels found it necessary to revise his work in the light of the new ethnographical materials that had become available.²⁰ The importance of juridical ethnology is greater even than its understandable usefulness in explaining to us the origins and the early stages of the development of law and its basic institutions. It can be of help to us in studying those factors which at all times exert influence on the legal order and on legal consciousness. The study of existing customs and traditions is still a matter to which the science of law is far from indifferent, even in countries with firmly established systems of legislative or precedent law. The special importance of juridical ethnology in the study of the emergence of law in the newly-free countries of Africa will readily be appreciated.

¹⁷ P. Vinogradoff, *Outlines of Historical Jurisprudence*, London, 1920.

¹⁸ V. I. Lenin, *Collected Works*, Vol. 9, pp. 240-45, Vol. 10, p. 339.

¹⁹ For views on the present situation of juridical-ethnographical studies, see J. Poirier, "Situation actuelle et programme de travail de l'ethnologie juridique", *Revue internationale des sciences sociales* No. 3, 1970.

²⁰ K. Marx and F. Engels, *Selected Works*, Vol. 3, p. 191.

But when all is said and done, juridical ethnology cannot take the place of the historico-sociological approach to law. It is particularly dangerous when conclusions derived from studies of ancient society and from "primitive law" are carried over in one way or another to contemporary society regardless of subsequent historical change. It is no accident, for example, that the findings of juridical ethnology are often cited in defence of the role of custom or in counterposing the state and law on grounds of primacy-of-law. We say nothing of the effort expended by some bourgeois authorities on law to set up their juridical-ethnographic researches against the Marxist view on the origins of the state and law.²¹

Still, despite the "misuses" to which it is frequently put, juridical ethnology has much to its credit in adding to our knowledge of law. There can be no doubt whatever of the usefulness of Marxist juridical ethnology as an integrated juridical-ethnographical discipline.

2. E. EHRLICH'S "LIVING LAW"

In its earlier phase bourgeois sociological jurisprudence was much indebted to Ehrlich's "living-law" concept. The Ehrlich view is more interesting than that of Geny, which started out from the role of the judge and the problem of interpreting law and was, in effect, an attempt to refute positivism without stepping beyond the framework of its problematics. With Ehrlich, however, the approach is different. Right from the outset he settles down to a criticism of jurisprudence on the grounds that its view of the complex world of reality is obtained, if not wholly, then chiefly from the narrow confines of jural practice which can yield merely a particle of the totality for the simple reason that in everyday life law extends far beyond the court room walls. It would be difficult to dispute the soundness of his proposition. Ehrlich clearly realised something which to this day has not been understood by contemporary writers who

²¹ See, for example, R. Lowie, *The Origin of the State*, New York, 1927.

regard judge-made law as the decisive element in the legal system. However Ehrlich's point that the multiplicity of legal relationships observed in the life of society should not be regarded as centred entirely on the court gave rise to a generally incorrect construct.

The source of this error can be traced to the concept of "union" or "amalgamation" (*Verband*). Ehrlich's contention was that society was a composite of unions and amalgamations of all kinds, beginning with the family, trading companies, municipalities, and culminating in the state. The union, then, as a cell of the social organism, is the place where one should seek, and find, the source of law. To trace the sources, growth of law and its nature, the first thing to be done is to study order (*Ordnung*), and this is found in the unions. The reason for the failure of all the previous efforts to explain law was their reliance on the written legal prescriptions and not on this order.²²

Just as in the distant past law signified the order obtaining in the gens, family and home, so now, too, it should be sought in the legal norms defining the internal structures of the "unions" and established by traditions, rules and agreements.²³

Ehrlich's motive in directing our attention to these "unions" is easily explained. His views matured during the turbulent phase of the rise of monopoly capital, with its mushrooming of all kinds of cartels, partnerships, companies and trusts which felt themselves constricted and hampered by the injunctions of the old civil law and even trading-company law. Big capital needing more elbow-room and hemmed in by the legislative pattern of the previous free competition, hastened to dispense with it. In this period monopoly capital, understandably, had little need of direct state support; in those days the factors foreshadowing the subsequent growing over of monopoly into state-monopoly capitalism were mere specks on the distant horizon. In achieving the concentration of capital, the monopolies insisted on the same principle of "laissez-faire", which was now not only anti-feudal, but was also baring its teeth

²² E. Ehrlich, *Grundlegung der Soziologie des Rechts*, S. 29.

²³ *Ibid.*, S. 30.

against any action by the state designed to buttress the "classical" capitalism. Hence the insistence on treating the state in the same way as any other union, and its legislation as merely one type of law, and far from perfect at that. Thus the Ehrlich concept may be seen as an "ideologised" juridical expression of the process of transition from the traditional capitalism to monopoly.

Long before Ehrlich the idea of unions, corporations, etc., had had wide currency in German legal writing—especially among the so-called Germanist wing. The "community" and "unity of comrades in law" (*Genossenschaftsrecht*) were presented as time-honoured specific aspects of the true German law, which set itself up on a nationalistic basis against the law based on the classical models of the received Roman law and liberal individualism. One of the staunch defenders of this view was O. von Gierke, who went out of his way to stress (particularly in his well-known critique of the first draft of the German Civil Code) that the law, having its origins in such a community, was of a far higher quality compared with the bourgeois legal systems and codifications deriving from Roman law and natural-law sources.²⁴ Ehrlich, clearly, cannot be described as a Germanist; in fact, he had little sympathy with the organic concept advocated by Gierke; but he never concealed that in giving pride of place to the concept of "union" he had received his first impulse from Gierke. For him "the Gierke teaching is one-sided in the sense that it confines to company law that which in reality is valid for all areas of law".²⁵

Ehrlich is sometimes rebuked for his tendency to define almost all the facts of life and relationships in legal terms.²⁶

²⁴ O. Gierke, *Das deutsche Genossenschaftsrecht*, Bd. 1-3, 1868-1881; O. Gierke, *Der Entwurf eines Gesetzbuches und das deutsche Recht*, 1889.

²⁵ E. Ehrlich, *Grundlegung der Soziologie des Rechts*, S. 18. S. N. Bratus expresses the view that Gierke's concept of the juridical person is designed "to justify the rule of the capitalist corporations in the imperialist era" (S. N. Bratus, *The Subject of Civil Law*, Moscow, 1950, p. 164, in Russian), that is, in the long run it pursues the same goal as Ehrlich, but puts special stress on the nationalist standpoint of the "truly German law".

²⁶ C. Allen, *Law in the Making*, Oxford, 1964, pp. 28-32.

In reality, he clearly distinguished the legal order from other spheres—morality, ethics, etc., although he took pains to point out (and not without reason) that these spheres in turn exerted an influence on the legal order and “entered into it”; he was also aware that the state based its activity on other things besides law.²⁷ He did, however, extend the concept of law to a totally unjustified degree. Norms issuing from the state, or, as he described them, “legal injunctions”, were, in his view, merely a rather small part of the law. The great bulk was the “living law”, law as an internal order, having its existence in unions, ever-mobile, subject to change, its mission being to react quickly to and to reflect the new economic requirements. “All private law is law formed in unions,” Ehrlich proclaims. This law he supplements with a “secondary order”, that is, the law guarding the existence of the unions themselves, chiefly the criminal law and procedural law. Because Ehrlich extended law far beyond the boundaries of state norm-creating, he refused to regard compulsion as an obligatory and specific element of law. Yet this denial of compulsion in law becomes a means of quite brazen apology for the capitalistic legal order as a system that satisfies the needs of all, except a few groups and classes in society and, therefore, supported without compulsion, due to the “awareness of the need for a system of law” even among non-propertied people.²⁸

All Ehrlich's sympathies, then, are on the side of the “living law”. It is not, however, so much a matter of sympathy as the fact that he arms with this “living law” the courts, holding that only on this basis and not by way of the slow-moving, rigid written law can cases be judged. “But from what source does the court find the norm that enables it to pronounce judgement? Any norm is based in the first place on the internal order established in the given union, that is, on those legal facts from which the order derives . . . the relationships of control and ownership, contracts and rules. . . . The verdict will be based on all the legal facts as they existed in the given union prior to the dispute.”²⁹ Ehrlich does not deny that a norm applicable to the parti-

²⁷ E. Ehrlich, *op. cit.*, S. 45.

²⁸ *Ibid.*, S. 62.

²⁹ *Ibid.*, S. 98-99.

cular case may be found in one or another of the codifications or in other sources originating in state law. The occasions, however, are likely to be rare in view of the fact that the legal guidelines tend to be overtaken by the dynamic of life. Hence his "living law" leads directly to the right of free judicial discretion. In effect, the whole of his construct could be set out in the following terms: "In cases where the civil or commercial codes do not apply, resort will be made to the rules governing the given monopoly amalgamation." The end result is that we are back once more to Geny with his "gaps in the law", or with the Rumelin and Heck school with its "weighing of interests". Although Ehrlich never invokes the "interests" concept, perhaps because of its mercantile accent being too pronounced, he is fully aware that his "legal facts" and, arising therefrom, his "legal norms of the unions" are expressive of the interests of capital and its associations. Lauding his "living law", Ehrlich becomes a convinced opponent of codification and, generally, of transforming "living law" into "state law". He stands four-square for both the economic and juridical "laissez-faire" of monopoly capital.

Ehrlich criticises on these same grounds socialism, too. In capitalist society, he maintains, ownership, property, contract and inheritance perform "almost automatically", although "not without considerable error and contradiction", what in socialist society has to be done by numerous state agencies.³⁰ Ehrlich has been proved wrong, not only with regard to socialist society which makes wide use of the legal institutions of property and contract, but also in respect of the immediate prospects of capitalist society. His concept could not be adapted to the change-over from the "minimum" to the "maximum" state, that is, to state-monopoly capitalism.

Ehrlich promised his readers that he would discover the sources of law in society itself. He also coined a series of attractive slogans urging the science of law to abandon the text-books, to break free from judicial practice and study the actual legal relationships in the course of their development, to summarise the historical materials, to keep an

³⁰ E. Ehrlich, *op. cit.*, S. 48.

eye on economic life, to start from the concrete and not from the abstract, and so on. But it was all sheer declaration, and in his explanations of law he never got much further than the long-established juridical concepts. Certainly he was right in saying that positivist theory had failed to grasp the fact that neither contract nor inheritance were the consequence of a norm of law. However, by basing himself on the "facts of law" (*Rechtsstatsachen*) idea as foreshadowing the norm, he was unable to explain the why and wherefore of his facts of law, why certain social relationships acquired a legal aspect. In effect, he never broke free from the relationship between the legal fact and the legal norm, thus reducing the entire problem to two juridical phenomena. He proclaimed that the juridical must be defined in terms of the social, but the social itself was again reduced to the juridical, taken in a slightly different plane. He thus never arrived at the idea of the socio-economic and class mechanism determining the nature and basic patterns of the development of law.

Ehrlich presents us with voluminous and at times interesting historico-legal materials. But as frequently happens, it is not so much a case of objective conclusions being drawn from history, as of history being summoned to confirm the concepts already formulated. One of the most striking regularities recorded in the history of the evolution of the state-organised society is the ever-growing role of the centralised (that is, emanating directly from the state) legal forms, the movement from customary law in the direction of state-made law. Ehrlich himself, followed by others, including some contemporary law scholars, eager to belittle the role of legislation and codified law, seems to be tracing history in reverse by appealing to the past rather than the present. Ehrlich begins by stating the fact that private-law codification has failed in many respects to keep up with the tempestuous growth of monopoly. On these grounds he declares, unjustifiably absolutising the specific historical situation, that state-made law can never cope with the requirements of everyday life. While in the first case he proceeds from the reality to the conclusion, in the second he adjusts history to fit the concept already arrived at. The needs of a particular situation, perceived from the

standpoint of particular social forces, appear in the theoretico-ideological form of a universal sociological law.

Ehrlich gave much thought to ways and means of studying the "living law", since it was clear that the methods of the old positivist jurisprudence were inadequate for this purpose. His search brought him close to, if not fully in line with, what subsequently became known as concrete-sociological methods of research.

With regard to a number of problems (for instance, land lease and family relationships) he outlined a fairly wide range of questions which he thought the science of law should answer, though many of them were obviously beyond its scope. He also attempted an integrated study of the "living law" of separate regions (old pre-war Austria-Hungary had been conveniently split up), especially in Bukovina.³¹ And although his questionnaires remained for the most part unused, they are of interest to us as essays at a concrete sociological analysis in the sphere of law. He was most earnest in his insistence on such subjects as the national economy, statistics, sociology and social psychology being studied in the law faculties.³²

His insistence on extending the range of subjects and research methods in the study of law was of much greater significance than his unjustified extension of the range of the actual concept of law, or his call for a "free search" for law by the judge. In his concept, however, all three components—the "living law", "free search for law" and "study of the living law" are too closely interwoven. He is on solid ground when he says that the science of law must study the concrete law relationships, their dynamics, social-psychological motivation, the emergence of traditions and custom, the new structural-organisational forms, and so on. But most certainly he is not correct when he goes on to declare all these "living phenomena" far more important and essential aspects of law than "the dry paragraphs of statutes and codes".

³¹ E. Ehrlich, *Recht und Leben*, Berlin, 1967, S. 49. From the standpoint of theory Ehrlich tended to exaggerate the interlocking of law and geographic factors.

³² *Ibid.*, S. 79.

3. LAW AS AN "ORDER RELATIONSHIPS"

Although institutionalism and pluralism figure prominently in the Ehrlich concept, they failed to evoke any great response in German writing on the law because they were not particularly popular in Germany. The biggest response was to his "living law", his free judicial discretion argued on psychological grounds (Isay and Riezler) and his view of law as a "legal order", all three of which attracted considerable attention. In France, on the other hand, the sociology of law made headway with institutionalism.

We have already referred to the point that sociological jurisprudence occupied itself chiefly with revising the actual concept of law itself. Ehrlich, too, made efforts in this direction. The concept derived from the idea that neither legislation nor the legal norms, but certain other elements constituted the basis of law. According to Ehrlich these elements were the "law of unions" and the "facts of law" in the shape of "the living law". Other followers of the sociological trend (Muromtsev and Sinzheimer) came up with their "relationship" concept and law is defined here as "an established or functioning order of relationships". The totality of norms reflects merely that area of law already set in the mould of the order of relationships; the other part is expressed by the judge and can be manifested only in non-legislative ways.

But if the description of law as an established or functioning order of relationships is separated from the general context of the concepts under review, there is nothing much wrong with it. We need but return to the historical process of the emergence of law and recall the words of Marx and Engels: "In the earlier and more primitive epochs . . . the individual factual relationships in their crudest form directly constitute right."³³ In its evolution, law made its way from the relationship to the norm by virtue of the fundamental (basic) and the other vital social relationships constantly repeating themselves and enjoying the protection of the political authority of the day. These relationships ac-

³³ K. Marx and F. Engels, *The German Ideology*, Moscow, 1968, p. 381.

quired legal form (that is, appeared as law obligatory for those involved in it) and later found a generalised expression in the legal norms. What is more, the whole meaning and purpose of law is to mould, consolidate and develop a certain system of social relationships from the standpoint of the ruling classes. Failure to do so would signify that law had failed in its social purpose. The existence of a certain protected order (or system) of social relationships is one of the most important aspects of law. Obviously it was this that P. Stučka had in mind when he described the view that law, being more than an aggregate of norms, is itself a system, an order of social relationships, as a valuable acquisition, which came to us via the sociological school of bourgeois jurists (for example, Muromtsev).³⁴

However, the above-mentioned propositions do not restore the sociology of law school to a state of grace. Its definition of law as an "established order of relationships" is, in the general context of its views, erroneous. In this respect the following circumstances have special significance.

First, this school does not set out from a scientifically grounded viewpoint concerning the character and pattern of development of social relationships in a class society. As used by this school, the concept of "social relationships" while it may cover a multitude of things, always remains vague and indefinite. What is more, in the absence of anything in the nature of precise criteria capable of delineating the real legal relationships from the other social relationships, there is an unjustified extension of the juridical, the affirmation of what might be described as the "panjuridical".

Second, in the juridical-sociological concept of law, law as a relationship is counterposed to law as a norm (a grave error). In reality, whether we turn to the process of law-making or to the influence exerted by the law already at work in the area of the social relationships, the norm of law and the legal relationship (or the system of law as a whole and the legal order) interact and achieve unity, although breaks, discrepancies, lack of harmony, premature action, a kind of "scissors", cannot be ruled out (in fact, it

³⁴ P. I. Stučka, *Selected Works, Concerning the Marxist-Leninist Theory of Law*, Riga, 1964, p. 295 (in Russian).

was from one such situation and its subsequent absolutisation that the juridical-sociological schema emerged).

Third, the juristic-sociological construct of the "living law", and the view of law as an "order of relationships" derive from rejection of the importance of the constitutive role of the state in law-making and in developing the existing laws. If the state does come in for mention in these constructs, the reference is merely to its function as the formal registrar of law already in action, and not even the formal act of registration is regarded as obligatory. In this respect sociological jurisprudence, especially in the person of Ehrlich and its other German spokesmen, is at one with the traditions of the historical school; law is not made by the state, but merely discovered by it. Like the historical school, bourgeois sociological jurisprudence turns a blind eye to the fact that it is precisely the state influence on social relationships—be it their reinforcing, their development, or, perhaps, their proscription—which imparts a new quality to those relationships and converts into law the rules of behaviour that are formed in the process of these relationships evolution.

Fourth, the definition of law as an "order of relationships" is associated with the "autonomous law movement", that is, with the demand for the maximum extension of judicial discretion and with the concept of the judge as the central figure in law-making. The "autonomous law" idea, as we have repeatedly said, permeates all the many different types of bourgeois law schools, while not necessarily deriving from a juridical-sociological base;³⁵ the fact is that all of them, whether they rely on psychological factors, on an order of relationships or institutionalism, are, as a rule, in sympathy with the idea. Sociological jurisprudence had a very specific practical and ideological function to perform. It helped in clearing the way for monopoly capitalism, and in doing so employed methods which resulted in emasculating legality.

In the light of the foregoing, it is not difficult to discern the liberties taken by some Western writers with the defi-

³⁵ On this subject see, for example, D. Lukovskaya, "A Study of the Free-Law Movement in France". *Vestnik LGU* No. 11, 1968, p. 133.

nition of law advanced by Stučka in the 1920s (a system or order of social relationships corresponding to the interests of the ruling class, and protected by the organised power of this class) in professing to see it as a kind of carbon copy of the standpoint of bourgeois sociological jurisprudence. The Stučka definition differs fundamentally from this view by virtue of its class understanding of law and, correspondingly, its unfolding of the class nature of law and of the legal order, that is, its emphasis on the very points which bourgeois sociological jurisprudence tried to evade. Further, the Stučka definition underlines the inseparable link between law and state as a major feature of law, whereas in the bourgeois science of law the stress is all the other way. And lastly, Stučka does not counterpose the legal order to the system of operative law and particularly, legislation, as does the bourgeois sociology of law. The absence of any mention of the norms of law—a definite shortcoming of the Stučka definition—can be seen as due to the conditions obtaining at the time (the state newly created by the revolution needed more time to round off its system of new positive law). Nevertheless Stučka and other Soviet jurists of those days did not deny the importance of the legal norms. Both legal order and norms were used by Stučka as complementing concepts, as ascending from the concrete to the abstract, but never did he oppose one to the other, not even for purposes of substantiating a possible non-application of the operative legal norm, whereas one of the basic lines of bourgeois sociological jurisprudence was to give grounds for judicial discretion, for overstepping the strict boundaries of law.

We must also stress the basic difference between this juridical-sociological attitude and the views of those Soviet jurists who advocate including in the definition of law the legal relationships or the corresponding subjective law. For example, Kechekyan and Piontkowski, basing themselves on the dialectical unity of the norms of law and the legal relationship, eliminate thereby the counterposing of relationship and norm on which bourgeois sociological jurisprudence is based.³⁶ Moreover, they underline the class and social

³⁶ See S. F. Kechekyan, *Law Relationships in Socialist Society*, AN

nature of law and the active law-creating of the state. As noted by Piontkowski, "elevating the will of the ruling class in law signifies not only that this will is expressed in terms of law, but also that it is embodied in legal relationships guarded by the coercive powers of the state".³⁷

4. INSTITUTIONALISM AND LAW

Institutionalism, in addition to being a school of law, is a fairly broad politico-sociological concept reflecting the increasingly complex political organisation of bourgeois society in the era of imperialism, the aggravation of class conflict and the other contradictions observed in social life, the growing role of the parties, of the trade unions, the role of religious bodies and the appearance on the political arena of the associations of capitalists. "To treat subject in rather schematised and simplified terms," writes V. E. Guliev, "it may be said that whereas in pre-monopoly times the citizen related to the state chiefly as an isolated individual, nowadays in the imperialist phase the citizen-state relationship is supplemented by yet another element; now it is a citizen-organisation-state relationship."³⁸

Nineteenth-century bourgeois ideology had its starting point in the individual. In the name of safeguarding his rights, consecration was extended to private enterprise; "laissez-faire" was the order of the day and political democracy was inseparably bound up with the interests of private property. In its fight for the economic and political interests of the working people, Marxism and the socialist movement advanced the concept of class and class struggle. The bourgeois ideology of the imperialist phase sought, by invoking the organisation concept ("institution"), to find a "third way"—a new point of departure which could be regarded as overcoming the spirit of collectivism, the ex-

SSSR, 1958, p. 19, ff. (in Russian); A. A. Piontkowski, "Studies of the Law of the People", *Sovietskoye gosudarstvo i pravo* No. 11, 1962, pp. 15 ff.

³⁷ *Current Problems of the Soviet Socialist State and Law*, Moscow, 1969, p. 99 (in Russian).

³⁸ *Contemporary Bourgeois Teaching on the Capitalist State*, Moscow, 1967, p. 59 (in Russian).

tremes of capitalist individualism and, simultaneously, be opposed to—and this was its chief purpose—the teaching on class struggle and on the class nature of the capitalist state.

As visualised by institutionalism, any highly developed society appears as the totality, or rather as a conglomerate, of institutions of different kinds. The institution is the first brick in the edifice of society as a whole, and its political structure in particular. The institution alone provides the clue to an understanding of social life. It is, moreover, given a very wide meaning, embracing each and every long-established union or amalgamation of people and even any long-established order of things (Oriu). The institution is understood not as the outcome of any material activity on the part of people, not as a way of expressing economic, political and other social relations, but as expressing some kind of “organising idea”, a notion of the goals to be achieved. The institution, then, is an “enterprise on behalf of the idea and, with the idea incorporated into the enterprise the latter becomes strong and enduring, superior in strength and endurance to the individuals through whom it functions” (Burdeau).³⁹ The Durkheim sociology, especially his category of the “collectivity of representations” played an important part in establishing the institutional approach and the category of the institution itself. Clerical postulates, too, are well to the fore in some of the institutionalist writing (emphasis on the role of the church as a valuable institution).

Institutionalism focussed attention on the relationship between the state and other elements of the political organisation of capitalist society, but it did so in rather a peculiar fashion. The state is described as one of the numerous institutions of political power, but not necessarily the premier one. This power is seen as the result of the spontaneously coordinated activity of the organisations and institutions of various sections of society and thus loses its class character. For purposes of underlining the idea that the state is, allegedly, merely one organisation among many, institutionalism

³⁹ Quoted by I. D. Levin in *Contemporary Bourgeois Science of State Law*, p. 152 (in Russian).

proclaims that the concept of sovereignty of the state is now a dead letter. Since the second world war, institutionalism has produced the ideas of "diffusion of power" and "pluralistic democracy", which play an important part in "mass ideology" and in bourgeois and reformist propaganda.⁴⁰

Institutionalism deprives the state of its monopoly of law. The state is seen as one of the numerous institutions in society, each of which has its law and participates in making and elaborating other norms obligatory for all. Institutionalism once again advances the formula "no society without law" (*ubi societas ibi jus*), which was widespread at one time in bourgeois legal science, but applied mostly to the past.

Here is an American writer on the subject: "The traditional view of law as an integral part of the state has tended to obscure the fact that law exists in non-state contexts as well."⁴¹ For Evan one of the really great achievements of juridical-sociological thought, dating from Ehrlich, was its recognition of the multiplicity of legal systems, corresponding to the multiplicity of unions and groupings of all kinds in society. He divides these legal systems into public and private, and these in turn are further subdivided into public-democratic, public non-democratic, private-democratic and private non-democratic. Curiously, the Evan schema omitted the legal system as it is generally understood, that is, he left out the system of law functioning in a given country in the aggregate of its branches and institutions.

The French institutionalist Lévy-Bruhl divides the law researchers into two groups. First, the monists, who hold that the state alone is the repository of the legal system and is alone vested with the right of law-making (Lévy-Bruhl includes Marxism as one of the first in the monistic camp). Then come the pluralists who adhere to the view that in theory "every human group has its own law, be it a

⁴⁰ For details see *The Modern Bourgeois Teaching on the Capitalist State* Chap. II (in Russian); and V. I. Gantman, "A New Variation of the Reformist Theory of the Bourgeois State", *Sovietskoye gosudarstvo i pravo* No. 7, 1958.

⁴¹ *Law and Society*, ed. by W. M. Evan, Glencoe, 1962, p. 183.

sports club, trading society, trade union or the nation".⁴² True, he argues, one should not go to the extreme of assuming that every time an association of one kind or another draws up its rules it is thereby creating a corporative law as distinct from the law of the land. For the most part this is "secondary law", which remains within the frame of the statutes, but in many instances gives them greater detail and fullness. Quite often, however, it happens that the association, unable to achieve its purpose within the frame of the operative law, will proceed, consciously or unconsciously, with the making of a new law, helped in the process by prescriptions of a "para-legal" or even of a "non-legal" nature.⁴³

"Where," Lévy-Bruhl asks, "are we to seek the source of law?" And he answers: "For sociological theory, of which I am a supporter, there is but one answer: 'law emanates from the social group.'"⁴⁴ Law is distinguished by three features. (1) it is obligatory (2) it is established by social groups (3) it undergoes a process of ceaseless change. In support of his view, Lévy-Bruhl considerably modernises the traditional idea of the hierarchy of sources of contemporary law. The leading place among these is accorded now not to law but to custom, true, "in the new sociological interpretation", as something fundamentally different from the customs of primitive times. Every time a legal norm, due to changes in the objective conditions, ceases to be operative (although it is not formally repealed) it follows that it has been ousted by the "repealing custom". And, conversely, whenever practical requirements necessitate new norms in the law of the land, it simply reflects the "creative custom", already shaped by the efforts of a given social group which, even before the appearance of the general norms, had been a source of law.⁴⁵

It will be observed at once that this construct repeats most of the incorrect views of these trends in bourgeois juridical sociology examined above; it does not, however,

⁴² H. Lévy-Bruhl, *Sociologie du droit*, Paris, 1967, pp. 29-30.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, pp. 39-40.

⁴⁵ *Ibid.*, pp. 42-44.

repeat the definition of law as an "order (system) of relationships". Hence the "creative custom" concept derives from the idea that the role of the state is that of formal registrar of a law which has already taken shape, and that state regulation of relations that are being formed is not regarded as an essential constitutive factor of law-making.⁴⁶ The whole concept is based on a blurred and incorrect interpretation of an actually possible, but by no means universal case, in which a rule of conduct becomes crystallised in the process of social practice without any direct or visible influence and participation by the state and the existing legal system and is only later sanctioned by them. Only in the actual process of gaining sanction (by statute or through court practice) does it become law.

Some of the other previously mentioned theses of institutionalism are likewise based on a confused reflection of the real phenomena, resulting in incorrect and, in a sense, tendentious generalisations and conclusions. Different organisations and associations have, of course, their numerous norms and rules regulating their structures, the rights and duties of members, their relationship to other bodies, and so on. Some of these can be considered as legal norms inasmuch as they are issued on the authority of the state. Moreover, in the course of their everyday functioning, these organisations undoubtedly make a contribution to law both by bringing up new problems requiring legal regulation, and by pressure-group action which influences the norm-creating functions of the legislative and executive authorities. But, even granting all this, it by no means follows that just as the state these organisations and institutions are themselves invested *ex facto* with the right to inaugurate new rules of behaviour binding on all citizens. This is more than an error in theory; just as in the case of judge-made law, it is a grave distortion of the real state of affairs in present-day bourgeois society. Some institutionalists evidently imagine that with this kind of approach they are backing up the anti-*etatism* postulates which are so much to the

⁴⁶ We have in mind here a developed state-organised society (for this is the main target of the institutional concept), and not the historical process of establishing law way back in the distant past.

fore in Western legal writing. In fact, by effacing the boundaries between state and non-state social norms, this approach could have consequences of a reverse order.

The institutionalism concept confuses law with norms of another kind—the rules and normatives of conduct drawn up by the various organisations which abound in a highly developed society. The nature of these norms is, understandably, an extremely important question. Soviet legal experts, too, devote much attention to them.⁴⁷ If we were to ask what is the general nature of this normative mechanism designed to regulate the behaviour of citizens in modern society, then obviously the rules and the norms we have been discussing would figure large; in some circumstances they could exert an even greater influence in the elaboration of standards of behaviour than the legal norm. Even so, this would still not provide the grounds for including norms of this nature in the category of law, for to do so would amount to turning them into what a Western critic of institutionalism has described as a “boundless ocean”⁴⁸ and depriving the concept of the legal norm of any specifics. On the contrary, the really pressing need is to explain the manner in which the legal and the non-legal norms relate to one another, since this alone will enable us to grasp their interconnection and, equally, the mechanism of normative regulation as a whole.

Let us agree for the moment with the institutionalist wide-ranging view on law. Even so, the investigator still finds himself confronted with the question, why is it that the norms of a particular category in this immense expanse of law differ substantially from those of another category in the process of their formation, the character of their sanctions, sphere of operation and, lastly, the manner of their application. In other words, within the boundaries of this broad view of law it becomes necessary to make

⁴⁷ See, for example, A. I. Lukyanov, B. M. Lazarev, *Soviet State and the Mass Organisations*, Moscow, 1960; V. M. Gorshenev, *The Participation of Mass Organisations in Law Regulation*, Moscow, 1963; Ts. A. Yampolskaya, *Mass Organisations and the Growth of Soviet Socialist Democracy*, Moscow, 1965 (all in Russian).

⁴⁸ R. Pinto, M. Grawitz, *Méthodes des sciences sociales*, Paris, 1967, p. 68.

distinctions which, in effect, amount to an internal repudiation of this concept built entirely on external attributes.

A demarcation operation of this order would be, basically, only the logical repetition of the actual historical process, which operated as a differentiation of the previously united complex of religious, moral, legal and other notions and postulates. In the course of this process, law assumed the shape of an independent system. Objectively it had its base in the socio-economic developments of a class-divided society, while its immediate agency was the functioning of the political authority—the state. The specific, constitutive aspects of law are firmly rooted in its interconnection with the state. We have in mind here something more than the ordinary penal sanction imposed by the state for non-observance of the norms. Sanction is but one aspect—true, a substantial one—of the state-law relationship, which is no less clearly expressed in law-making and in law application. The more complex the state-organised society, the greater the variety of ways in which this important regular interdependence is manifested.

Some Western critics of institutionalism have drawn attention to its failure to deal with the “global quality” of legal norms, that is, their extension to society as a whole, which is not a feature of the “law” of other institutions.⁴⁹ This “global quality”, however, is, in its turn, a consequence of the law-state connection and can be explained solely on this basis.

It is when we turn to homogeneous social groups such as, for example, political parties, trade unions, federations of industrialists, associations of churches and so on, that we can really affirm, though not unreservedly, that the rules and other norms governing the organisational forms and functions of these bodies are the results of common postulates and solidarity of interests. The specific device of institutionalism is to extend this model of a homogeneous grouping to a class-divided society with its incompatibility of interests and, what is more, its class antagonisms. The outcome of the operation is that bourgeois law, in the strict sense, is presented to the reader as an expression of complete social solidarity, free from its class antagonisms.

⁴⁹ See, for example, R. Pinto, M. Grawitz, *op. cit.*, pp. 78, 84.

Institutionalism is opposed to any class approach to the essence and role of law in general, and the role of bourgeois law in particular. It worships at the shrine of "solidarism", proof of which is at hand in yet another concept which claims, moreover, to be working out the philosophical and methodological fundamentals of legal sociology. This brings us to the views of G. Gurvitch, a law theorist who since the Second World War years has gained a prominent place in Western sociology.

5. THE SOCIOLOGICAL-INSTITUTIONAL CONCEPT OF G. GURVITCH AND P. SOROKIN

Way back in the 1930s, Gurvitch advanced his idea of "social law" and stoutly championed it. He had in mind not public legislation and certainly not the "socialisation" of bourgeois law as advocated by reformist writers on the subject (for example, Radbruch's public or social law). Gurvitch's "social law" was the "law of each society", group, class, and organisation, that is, of the public or social amalgamations at varying levels. Gurvitch described his idea as the "pluralist philosophy of law". He forthrightly condemned the old individualistic understanding of law with its worship of the kind of the legal thinking which pictured the individual—the subject of law—on the one hand and, on the other, the state-established legal system. Gurvitch's "social law" was designed as a means of overcoming this antiquated individualism and, simultaneously, effecting a "renewal of legal thought"⁵⁰ which, he maintained, was the insistent demand of the times.⁵¹ Later, when he became one of the theorists of Western micro-sociology and of "hyper-empiricism", he interpreted social law as an expression of the higher forms of "sociability", that is, human social intercourse. In a brief essay entitled "The Sociology of Law", one of a collection of articles by Western sociologists, he advanced the view that "social law is the law of objective integration in the We, in the immanent whole. This law

⁵⁰ G. Gurvitch, *L'idée du droit social*, Paris, 1932, Chaps. II, III.

⁵¹ G. Gurvitch, *Le temps présente l'idée du droit social*, Paris, 1931.

helps its subjects to participate in the whole, and the whole in its turn will have its place also in legal relationships. Social law is based on trust, whereas individual law, be it the relation between groups or persons, is based on mistrust. The first is the law of peace, of mutual aid, combined undertakings, whereas the second is the law of wars, conflicts and division. Since social law is based on trust, it cannot be established by external action. It can exert its regulative action only from within, in an immanent way. Hence it is always autonomous. . .".⁵²

The sociological jurisprudence elaborated by Ehrlich, Sinzheimer and earlier still by other Europeans undertook the working out of a new concept of law. The Gurvitch approach, however, is somewhat different; his concept of law is derived from his "pluralistic philosophy of law" which, only later, poses the problems of the sociology of law.

"In what does the reality of law as a specific phenomenon of the world of reality consist?" Such is the Gurvitch formulation of the fundamental question of the pluralist philosophy of law. Legal thought, he maintains, has provided various answers to this question. Some will say that the reality of law is expressed in state legislation, for others it is the "pure norm"; a third group will say that it rests in the subjective view of the individual, while a fourth will opt for the objective fact, and so on. But all four are wrong or, at best, inadequate. The reality of law, according to Gurvitch, is associated with the concept of "juridical experience" (or, to be precise, concept of "immediate juridical experience"), expressed in "collective acts of recognition", of definite values.⁵³ As a result of these "collective acts of recognition", certain factual situations assume the shape of "normative facts", and it is these that impart effectiveness to the legal norms. The "immediate juridical experience" is not necessarily rational, conscious action, it may come about by way of intuition. But it is from this "juridical experience" and from the "normative facts" to which the experience gives rise that we obtain the "reality of law". This latter is

⁵² *Die Lehre von der Gesellschaft*, Red. G. Eisermann, Stuttgart, 1958, S. 215.

⁵³ G. Gurvitch, *L'expérience juridique et la philosophie pluraliste du droit*, Paris, 1935.

expressed not only in the aggregate of "social laws" (so many groups, so many "acts of recognition" and, correspondingly, legal systems) but also in the legal tiers, one of which is the intuitional, spontaneous, unwritten law, another being the law as it is set out in documents and statutes.

Gurvitch often said that his concept owed much to the trend in Western philosophical and sociological thinking associated with James, Bergson, Durkheim and Husserl, a trend which, in explaining society and the main social phenomena, takes for its point of departure consciousness, be it the "collective consciousness" of Durkheim, the direct data of the Bergsonian consciousness or the integrative experience of James. Gurvitch draws on the latter for his own "juridical experience".

When asked how, specifically, his "juridical experience" differed from other aspects of the "integrative experience" (for example, "moral experience"), Gurvitch singled out its quality of "collectivity". Juridical experience could not possibly be of an individual nature because of the very structure of the law.⁵⁴ In saying this he contradicts himself, for on the one hand in his scheme of things that which is regarded as the law depends on the juridical experience while, on the other, the "structure of the law" defines what the immediate experience must be in order to obtain juridical recognition.

Further, the specificity of the juridical experience is such that the regulation arising from the collective acts of recognition that express this experience is imperative-attributive in character. Here, as any lawyer will readily agree, Gurvitch invokes Petrazycki. For Gurvitch, understanding of the law as a two-way (as distinct from morality) imperative-attributive connection is an extremely important matter. Petrazycki is rebuked for his individualistic approach, since with him the "juridical experience" (Petrazycki used the term "law feeling") is something in the nature of an individual act, whereas according to Gurvitch it is a matter of "collective acts", of priority being given to the group concept as the actual foundation of law.

⁵⁴ G. Gurvitch, *L'expérience juridique et la philosophie pluraliste du droit*, Paris, 1935, p. 51.

He holds fast to the following definition, repeated over and over again in his writing: "Law represents an attempt to realise in a given social environment the idea of justice (that is, a preliminary and essentially variable reconciliation of conflicting spiritual values embodied in the social structure) through multilateral imperative-attributive regulation based on a determined link between claims and duties; this regulation derives its validity from the normative facts which give a social guaranty of its effectiveness and can in certain cases execute its requirements by precise and external constraint, but does not necessarily presuppose it."⁵⁵

Basing himself on this "global" and pluralistic concept, Gurvitch adduces four sets of problems which, he believes, should be revealed by the sociology of law as a special discipline qualified to study the "entire social reality of law". These are (1) the microsociology of law, signifying study of the various aspects of "sociability" (that is, people's social interrelationships) in their juridical expression (2) the juridical-sociological problems of the different groups and classes in society (3) the problems of juridical typology as applied to society as a whole (4) the problems of the genetic sociology of law, with due attention to the regularities and trends in law and the factors favouring their advance or, on the contrary, contributing to their decline.⁵⁶

Regarded as a research programme, the list raises no reasonable objection. Marxist teaching on law is particularly concerned with discovering the laws of development of the legal superstructure, the dynamics of the socio-historical types of law, the legal forms of the social relationships between people. If one is to obtain a notion of the evolution of law itself, of people's behaviour in the sphere of law, and also an all-round understanding of the normative aspects of the life of society (this is not confined solely to law) it is most important, as we have said above, to study the rules and normatives operating within groups and classes. Inasmuch as the science of law is obliged to take cognisance

⁵⁵ G. Gurvitch, *Sociology of Law*, New York, 1942, p. 59.

⁵⁶ *Die Lehre von der Gesellschaft*, S. 188-189. Gurvitch combines the second, third and fourth problems in what he describes as the macrosociology of law.

of the complex of social norms functioning in society and defining individual behaviour, it simply cannot ignore the problems involved.

The Gurvitch scheme, however, is not concerned with any general posing of these problems. It is rather an attempt to resolve them on a definite theoretical basis. His juridical-sociological programme is wholly bound up with defence of his concept of law, which quite apart from its eclecticism, is fundamentally incorrect.

To begin with, judged by its philosophical and sociological base, the programme is very much of an idealist nature. The prime factor of the "juridical reality" is, we are told, consciousness in the shape of the "collective acts of recognising" and, what is more, frequently these acts are carried over into the domain of intuition. Gurvitch is most insistent in declaring that law, due to its specific quality, relates neither to the world of the material nor the spiritual; it owes its existence to consciousness.

Here he is undoubtedly correct, but the point should not be stretched too far, which is what philosophical legal idealism does in making consciousness the demiurge of law. Marxism insists that law has always featured as a specific ideological phenomenon in the genesis of which consciousness has a special role to play; the real foundation of law, however, is embedded in the same objective social relationships of a class-divided society. These relationships determine, at times directly, and at times in the ultimate, the intricate ideological process of transition from the social to the juridical. With Gurvitch, however, this process, being independent of the objective reality, is subordinate only to the "collective acts of recognition".

Gurvitch, like some of his predecessors in philosophy, claims to have "overcome" both idealism and materialism. Even Petrazycki is assailed on the grounds that his concept of law emerges as the product only of man's inner emotions and spiritual torment, whereas the "juridical experience" implies influence upon factors of the external world and even "encounters their resistance". This, however, is wishful thinking so far as overcoming idealism is concerned. The relationship between the "juridical experience" and the objective reality is understood by Gurvitch in the Husserlean

sense of the "conjugation" of the subject and the objective reality, i.e., the latter does not exert a conditioning influence on the former. The "collective acts of recognition" exert an influence on the social reality, but they themselves are independent and act as independent entities, divorced from people's material production relationships.

True, in his later works Gurvitch offers us the concept of a material, or, as he subsequently described it, a morphological basis of law. Here he is concerned chiefly with demographic and geographic factors which affect the law only in the general way in which they affect the economy, religion, morality, and so on. Both the economy and the law are regarded as phenomena of the same rank, each influencing the other, acting now as cause and now as effect. When Gurvitch speaks of the material base of the law, what he means is the factors capable of influencing law. Underlying these factors, and law itself, "as the most profound stratum of the social reality", are the collective notions, the collective mentality".⁵⁷ Hence, it is not the material foundations of society—its base and the mode of production—which, by way of the social consciousness, engender law, but consciousness which, via the material and other factors, exerts a determining influence on law.

Gurvitch the sociologist wrote much about the dialectics. "We would like," he writes in one of his books, "to read over the entrance to the future palace of the science of man the words: 'No entry for he who is not a dialectician.'"⁵⁸ Yet in his definition law is completely separated from the social contradictions in society. For him, law is the spontaneous collective "choice of values". But why the need for this choice? How is it determined? What kind of socio-political process does it represent? To these questions Gurvitch provides no answer. In his view law stems not from the class antagonisms in society but always from a basis of unity.

True, his concept finds a place for the idea of "the law of class", since class is one of those institutions giving rise

⁵⁷ *Die Lehre von der Gesellschaft*, S. 232-33.

⁵⁸ G. Gurvitch, *Dialectique et sociologie*, Paris, 1962, p. 9. Gurvitch advanced his concept of the "empirico-realistic dialectics", which he counterposes to the Marxist materialist dialectics.

to "social law". But his "law of class" has very little in common with the Marxist class-law concept. Here he is on the subject: "A class, insofar as it is constituted, possesses a solid structure and becomes a normative fact, engendering a specific legal order. This legal order is expressed in a non-organised law based on an awareness of class and appears spontaneously in customs, precedents, declarations, in an intuitive free discovery of law, etc."⁵⁹ Among the more striking examples of Gurvitch's "law of class" are "peasant law", "proletarian law" and "bourgeois law"; they compete and conflict with one another (simultaneously this is a conflict of different outlooks) and, moreover, each seeks to become superior to the legal order of the state and of the nation as a whole.⁶⁰ In the first place Gurvitch obviously confuses law and legal consciousness, presenting different class systems of legal consciousness as different systems of law and, second, he presents state law as something standing above classes, as the product of the unitary notions of a wider social community.

When he says "class law" may gain the "upper hand" over the law of the state, he would be somewhere near the mark if he were referring to those turning points in history and revolutionary situations which ended in the replacement of feudal law by that of the bourgeoisie, or of bourgeois law by that of the proletariat. But nothing of the kind. Gurvitch thinks that in one and the same capitalist society there can simultaneously exist bourgeois law and the law of the state which, for Gurvitch, is not a class phenomenon. This is a distortion of the genesis of law as a reinforcing by the ruling class not merely of its internal relations, but of all the basic economic, political and other relationships in the given society in which the partners appear as belonging to different social classes and groups and the individuals comprising them.

Gurvitch is fairly persistent in counterposing "bourgeois law" and state law which is supposed to be above classes. In his typology of legal systems the present period is characterised by the fact that "groups of economic action", on

⁵⁹ *Die Lehre von der Gesellschaft*, S. 221.

⁶⁰ *Ibid.*

the one hand, and the "territorial state", on the other, are fighting to achieve a "new juridical balance".⁶¹

The feature of institutionalism, as mentioned earlier, is an unjustified extension of the law concept to include phenomena which, while associated with law, are nevertheless specific and independent. This tendency reaches its apogee in the Gurvitch concept. On the one hand, he extends the range of the communities participating in lawmaking to include classes, nations and the subdivisions within these—cities, local communities, supra-national amalgamations, religions, political parties and all kinds of political and economic associations. On the other hand he extends the concept of law to include, in addition to the organisational and other extra-state social norms, law consciousness in its socio-psychological and ideological aspects, group opinions, and much else. In this vast multiplicity of "social laws" and "legal strata", law as such is simply submerged. Its actual social role shrinks. Instead of being regarded as a class and state phenomenon it is treated as a model of the normative connections of homogeneous social groups. In this global (obviously influenced by "panjuridism") claiming to embrace the whole "legal reality of society" there is no place for what is the lynch-pin of this reality in a developed state-organised society, for law in the real sense. Law, in the subjective sense, also disappears, that is, such a vital area of democracy as the rights and freedoms of man and citizen in his direct relations with society and the state.

To a degree, Gurvitch succeeded in showing the wide range of problems and aspects of the social reality which come within the vision of the sociology of law. But a really fruitful study of these problems presupposes not some kind of global "panjuridism", but rather a precise delimiting of different and independent social phenomena and categories (even though they may be interconnected), using their essence, origins and social functions as criteria. Certainly one cannot study legal consciousness, on any plane, including the specifically sociological, while treating it as law, or vice versa, study law while attributing to it the features of legal consciousness.

⁶¹ *Die Lehre von der Gesellschaft*, S. 224.

From the purely practical standpoint, the Gurvitch concept suffers from all the drawbacks of the "over-free" approach to law, which is ill-suited to the principles of legality and stability of the legal order. The vague "normative-fact" idea is contrasted to the traditional system of law sources. Gurvitch asserts that as distinct from the natural-law doctrine, positivism and Kelsenian normativism, his quest is for an objectively-based system of sources, for the "source of sources". That statement raises no objections. It is perfectly true that natural law, positivism and normativism have not taken a sound scientific approach to this question, the answer to which should be sought in the state structure of developed society, a structure which, in turn, is determined by a series of socio-economic and political factors. But that was not the Gurvitch way; his way, his seeking for the "source of sources" ended in his falling back on the hackneyed "normative fact". Moreover, and this is most important, his "source of sources" (as indeed, in the majority of bourgeois legal theories) was not so much a theoretical concept designed to bring into focus the base and the genesis of the highly complex system of law sources as it was a category with a practical juridical role in the process of making and applying law. If a given "formal" source of law, be it an act, precedent, or custom, contradicts the "normative fact" as the "primary and material source of law", then it should be regarded as invalid. Cases should be decided in keeping with the "juridical experience" and value incorporated in the "normative fact".

What is more, not all the normative facts are formally expressed in the shape of statute, precedent and other sources of law. In such a case, the official applying the law discovers them by way of intuition. This is precisely the sense of "intuitional positivist law", a construct which gives the green light to free, judicial discretion, which, according to Gurvitch, is one of its merits. Here he differs from the free-law idea only in the sense that, as he sees it, intuitional law is not always better than the pre-established norms, as is claimed by some of the more extreme followers of the trend. This, however, is disagreement within the frame of agreed fundamental postulates, and all the more so since in later writing on the subject Gurvitch expressed the view

that the constantly growing role of intuitional law to the detriment of the long-established law was one of the characteristic new developments.⁶²

We shall dwell for a moment on yet another version of the institutionalist concept, P. Sorokin's.⁶³ While remaining within the boundaries of the institutionalist schema, and upholding also the idea of law pluralism, Sorokin gives a slightly different formulation of the question of the inter-connection between the institution, the organised group, on the one hand, and the law, on the other. In his view, unlike that of many others, the law of the given institution is not the result but the precondition of the institution's existence. "What", he asks, "forms the constitutive element of the institution as an organised group?" And he answers: "The legal norms". Basing himself on the general statement that "most of our actions are but manifestations of the legal norms", he declares that it is the norms which "*constitute the inner nucleus, the skeleton, the heart and the spirit of any organised group or institution*". The family, the state, church, political party, an enterprise, trade union, school, university, scientific, philanthropic and other bodies such as the army, the Navy and even organised gangs of criminals—all are but the objectivisation, the personification of the legal norms and the views on law held by all, or at any rate by the overwhelming majority of the members of these groups".⁶⁴ Sorokin, besides sharing the institutionalist formula "where society is, law is bound to be", manages somehow to turn the phrase upside down by proclaiming "where law is, there you will find society".

But whence the norm itself?

Sorokin argues against the norms being regarded as the expression of the general will or interest, and this in its way is logical, otherwise it would conflict with his view that society is founded not on the norm but the general will or

⁶² *Die Lehre von der Gesellschaft*, S. 230.

⁶³ P. Sorokin, "Organisierte Gruppe (Institution und Rechtsnormen)", *Studien und Materialien zur Rechtssoziologie*, Köln and Opladen, 1967. Some of the theses are reproduced by Sorokin from his *Elementary Textbook on the General Theory of Law in Connection with the Theory of the State*, Yaroslavl, 1918. (in Russian).

⁶⁴ *Studien und Materialien zur Rechtssoziologie*, S. 98.

interest, which, in turn, would have to be defined by some other social factors.

Being an institutionalist, Sorokin is very much opposed to the idea of the norm as the result of law-making by the state. Polemicising with those who profess to see a marriage of state and law, he blunders into at least three errors that are typical of primacy-of-law enthusiasts.

First, the part played by the state in establishing law is understood solely as law-creation, and chiefly as free-law creation, although on the historical plane the state sanctioning of established relationships is no less effective. As proof of his non-state concept of law, Sorokin recalls that in the Middle Ages the rights of the city dwellers and of the crafts and guilds were established "without the state and without the authority of state". He thus confines the political-juridical role of the state solely to law-creating in the form of establishing the new relationships, while ignoring the fact that the state is acting also as a constitutive factor by converting the established relationships into state-dependent common law.

Second, like many other commentators on the subject, Sorokin incorrectly describes the evolution of the English Common Law as a process that occurred quite apart from the state; in reality, the power of the judiciary—the third power in the well-known division of power theory—is, like its other two partners, a state authority, and the fact that the Common Law became writ by the centralised King's Court is but a further confirmation of this fact.

Third, the perfectly sound thesis to the effect that both the structure of the state and its mechanism are reinforced by law is interpreted by Sorokin in the sense that the state presupposes law as something preceding the state. This oversimplification substitutes a logical construct for complex social interrelationships. The legal reinforcing of the state structure and its mechanism is but one aspect of the functioning of the state and of its evolution, which is conditioned in turn by factors of an economic and political nature and develops alongside them in the process of the complex interaction of the components of the political superstructure in a class-divided society.

Sorokin sees the determining constitutive factor of the legal norm as the two-way association of the subjects of

the relationship. He reproduces Petrazycki's concept of the imperative-attributive psychological link as the foundation of law. For Sorokin, too, the norms are, likewise, two-way rules of behaviour which are "inherent in the consciousness of each of us, in our psyche", and which are formed by people's experiencing certain situations as law situations, i.e., conferring power on one party and duty on the other. It was from Petrazycki that Sorokin borrowed the ideas concerning the distributive and organising functions of law, the structure of the norm and the division of law into official and unofficial categories.

There no need to examine these points in detail or to engage in a critical analysis of the psychological law doctrine. Suffice it to say that the Sorokin concept was an attempt to combine the institutional approach with Petrazycki's psychological law doctrine (tendencies in this direction were displayed also by Gurvitch), to extend the Petrazycki approach to law *per se* to the social norms of all "institutions" or "organised groups". The enterprise was a failure; it brought no gain to the bourgeois theory of law as a whole (except for an apparent novelty), to the psychological doctrine or even to the institutional theory, viewed as an attempt to explain the multiplicity of institutions in bourgeois society, the increasing complexity of its institutional structure.

Petrazycki was not an institutionalist; his concept appertained to law as such, in its relationship to the state and to law consciousness. Many of his propositions, though unsound theoretically, reflected the actual features of the historical situation, and important aspects of the evolution of law and its social functions. When transplanted to the much narrower field of socially homogeneous organised groups, these propositions (for example, the relationship between official and unofficial law and the distributive function of law) at once lose their validity, if only because they were meant to apply to a state-organised society which is not homogeneous in the class sense. This kind of "institutionalising" of his ideas, based on formal logic, is of no great help in deepening our appreciation of law and law consciousness, even when taken in their psychological aspects.

We have said more than once that, on the one hand, institutionalism so to speak "dejuridises" the law, dissolving it in the other social norms and, on the other hand, and contrary to all its proclaimed sociological postulates, "juridises" the social reality, reducing it to a conglomeration of norms and institutions. Sorokin, too, for his part, deepens this particular tendency, so much so that, in effect, the legal norm becomes the cornerstone of organised sociability. Clearly, this construct of the "legal norms as the basis of society and the psychological postulates as the basis of the norms" is useless as an explanation of the involved institutional structure of modern bourgeois society as a whole and, equally, of the organised groups of which that society is composed, groups differing in class outlook, economic status and ideology.

6. SOCIOLOGICAL JURISPRUDENCE IN THE UNITED STATES

It is generally believed that sociological jurisprudence is widespread in the United States. This is certainly true if we mean the sociological schools in American legal theory. According to the Polish researchers Opalek and Wroblewski, of the three main US schools—analytical, philosophical and sociological—the tone is set by the last two.⁶⁵ And when we recall that the philosophical or natural-law trend achieved prominence only in the post-war years, it can be affirmed that US legal theory has long been dominated by sociological jurisprudence and its related branches. In Europe, on the other hand, the sociological school never came anywhere near the prominence it enjoys on the other side of the Atlantic, a situation facilitated by socio-political and by legal and ideological factors peculiar to the United States. It would be wrong, however, to infer from this that it has had greater success in the United States than in Europe and, equally so, to exaggerate its influence on European legal thinking.

Arguing along these lines, some Western jurists, especially Americans, refer to the influence of Roscoe Pound

⁶⁵ K. Opalek and J. Wroblewski, *Współczesna teoria i socjologia prawa w USA*, Warszawa, 1963, p. 303.

whom they hail as one of the outstanding figures in sociological jurisprudence and 20th-century legal science generally. Pound, who died in 1964 in his 94th year, continued his writing on the subject almost to the end of his days. Five volumes of his writings appeared in 1959 under the one-word title *Jurisprudence*.⁶⁶

Yet when all is said and done, it is doubtful if Pound can be regarded as an original thinker.⁶⁷ Basically, his concept could be described as an amalgam of ideas taken over from Ehrlich, Kohler, Jhering and from the German "jurisprudence of interests" of James, Holmes, Ross and a number of other writers.

A. The Three-Pronged Concept of Law. "Justice Without Law"

Like his European colleagues, Pound entered the lists against positivist (analytical) jurisprudence. Whereas in Europe in the early part of the century positivism came under attack from the "free approach" school, Pound attacked the same target through the medium of his "instrumentalist approach".

Here one is conscious of the influence of pragmatism on the one hand and, on the other, of the situation under Common Law in which there is no need to add to the already considerable powers invested in the judge; all that was needed, in Pound's view, was to allow the judge a greater flexibility.

Pound characterised his "instrumental approach" in the following terms: "The engineer is judged by what he does. His work is judged by its adequacy to the purposes for which it is done, not by its conformity to some ideal form of a traditional plan. We are beginning, in contrast with the last century, to think of jurist and judge and law-maker in the same way. We are coming to study the legal

⁶⁶ R. Pound, *Jurisprudence*, Vols. 1-5, West Publishing Company, 1959.

⁶⁷ W. Friedmann, wrongly, in our view, ranks him with Jhering and hails him as a revolutionary transformer of 20th-century legal thought (*Rabelszeitschrift für ausländisches und internationales Privatrecht* No. 2, 1965, S. 225).

order instead of debating as to the nature of law. . . . Thus more and more we have been coming to think in terms of the legal order—of the process—not in terms of the law—the body of formulated experience or system of ordering. . . .”⁶⁸ Law is, above all, “social engineering”, in other words, a means of obtaining a whole variety of results. This functional role is seen chiefly as the answer to the question “What is law, what is the main object of juridical science?”⁶⁹ It is a view that leans heavily on Ehrlich’s contrasting of “written law” and “actual law”.

What is implied by the terms “social control” and “social engineering”? In Pound’s view, law implies three phenomena: first, what are referred to as the legal order, the systems of established relationships and regulative functions supported by the systematic use of compulsion in a politically-organised society; second, law as the aggregate of the legal prescriptions and normative materials (Pound classifies the norm categories depending on their degree of abstraction, giving priority to the most general—the so-called elastic norms) and, third, law as the process of dispensing justice, including the functions of the administrative bodies as well as of the courts.

This three-pronged classification is not without its internal frictions and discrepancies which come into the open especially when Pound elaborates on each of the three points. His normative materials, for example, prove to be a mixture of the jural categories and principles expressed in the law itself and, in their doctrinal elaboration, in the shape of the concepts and principles of the science. In elaborating the “legal order” idea, he refers to the functions of the courts, the administrative, legislative and other bodies in reconciling opposed interests and in defining rules of behaviour. In this respect, even from the standpoint of the sociological school, it is far from clear in what way law in the sense of the “legal order” differs from law as the “dispensing of justice”.

While accenting this special role played by law as the

⁶⁸ R. Pound, *Interpretations of Legal History*, Cambridge (Mass.), 1930, p. 152.

⁶⁹ The Pound theory is often called “functionalism” or “the Harvard School”.

process of dispensing justice, Pound does not deny that the dispensing of justice in keeping with the established norms (second aspect) has certain advantages, for instance, the possibility of the judge's using certain standards and previous experience accumulated in the norm. However, it is also possible to dispense "justice without law", that is, without established norms, whereupon the third aspect of law makes its appearance in its pure form, as it were, without any obligation to the second aspect. This "dispensing of justice (or judgement) without law", according to Pound, has its advantages (concreteness, greater adaptability to the social dynamic) and is also law.

One will have no difficulty in perceiving that simply by invoking this "three-pronged concept" a variety of conclusions may be deduced from one and the same case, depending on the "prong", or aspect, regarded as basic.

In line with Ehrlich and other European sociologically oriented experts, Pound regards the normative material as the least important member of his trinity. But he goes farther than Ehrlich by extending the range of his concept to take in both the legal order and judicial and administrative practice. The views advanced by Ehrlich, Geny, Kantorowicz, Sinzheimer and other European jurists argued wide judicial discretion and emphasised the role of the judge in law-making, but never extended to such an unconditional identification of judgement and law. This, obviously, is a dispensation that could make its appearance only in the conditions of a common-law precedent.

The distinction, however, does not end here. Ehrlich's "living law" and "legal order" were something that stood in opposition to the state and its law-making functions. Pound, however, abolishes this opposition; his view, on the contrary, is that any action by the organs of state is law. There are solid grounds for doubting that Pound clearly comprehended the evolutionary process of state-monopoly capital, and consciously made this his premise. What is not in doubt is that his concept of law was quite in harmony with this process. In one of his lectures S. A. Galunsky drew a parallel between the role of Keynes in economic science and that of Pound in law studies. It would be wrong, of course, to see any far-reaching identity between the two

personalities; the comparison, however, neatly points to the adequacy of the Pound concept where state-monopoly trends are concerned.

While it is true that the more active intervention by the state is accompanied by changes in law and by the appearance of new legal institutions, it is expressed in no lesser degree in a buttressing of non-legal methods of state and administrative action. Utilisation of political power on behalf of the monopolies (one of the hall-marks of state-monopoly capital) is reflected to a much lesser degree in law than in the everyday functioning of the machinery of state. It frequently happens that the financial oligarchy is not in a position to consolidate its direct interests in legal form, and at times it has no desire to do so. It prefers to rely on its *de facto* influence in the state mechanism and on the functioning of the latter without being tied by the legal forms or in such a loose way that they present no hindrance of any kind. Given these conditions, what is the significance of declaring administrative activity law, as is done by the American sociological school in the person of Roscoe Pound? What does he mean when he says that the rule of free administrative discretion is ousting law? It obviously implies an interpretation of law that furthers the interests of the forces seeking to take the activities of the bourgeois state machinery outside the legal and constitutional framework.

In defining his "instrumentalist point of view", Pound argues that what people do should correspond to their professed aims. This brings up the question of the aims pursued by law, its functional mission. The purpose of law, according to Pound, is to reconcile and harmonise the conflicting and overlapping demands and interests. This explanation is so banal that it would hardly merit notice were it not for the fact that Pound devoted hundreds of pages (half of volume three of the above-mentioned five-volume edition) to a detailed classification of interests, which is helpful in explaining the social essence of his concept.

S. F. Kechekyan has pointed out that in many ways the Pound approach to the interests problem is not unlike that of Bentham.⁷⁰ Like Bentham, Pound in a philistine way iden-

⁷⁰ *Vestnik MGU* No. 2, 1967, p. 9. Pound readily acknowledges the antecedents of this approach in Jhering and in the German "jurispru-

tifies man and property owner, individual and bourgeois. The interests in the Pound schema are chiefly those of the capitalist, the entrepreneur. True, conscious of the spirit of the times, he does not forget to add the interest of the state in maintaining its dignity. Nor does he forget to say that his notion of interest has nothing whatever in common with the Marxist view of law as the guardian of the interests of the ruling class.

Conscious, evidently, of the mercantilist overtones in his "interest" concept and also that his "table of interests" breathes too much of the capitalistic entrepreneurial spirit, Pound introduces his categories of "value" and "postulates of civilisation" as a guide in upholding "interests to be recognised", with the aid of law. While these values and postulates are seen as the ideal expression of the eternal rules of civilisation, one has no difficulty in discerning that, for the most part, they are a rather abstract expression of the ideas from which Pound's "table of interests" is compiled. The "table" assumes that (1) in civilised society men must be able to assume that others will commit no intentional aggressions upon them. (2) Men must be able to assume that they may control for beneficial purposes what they have discovered and appropriated for their own use, what they have created by their own labour, and what they have acquired under the existing social and economic order. (3) That those with whom they deal in the general intercourse of society will act in good faith and hence (a) will make good reasonable expectations which their promises or other conduct reasonably create (b) will carry out their undertakings according to the expectations which the moral sentiment of the community attaches thereto. (4) Men must be able to assume that those who are engaged in some course of conduct will act with due care not to cast an unreasonable risk of injury upon others. (5) Men must be able to assume that those who maintain things likely to get out of hand or to escape and do damage will restrain them or keep them within their proper bounds.⁷¹ Having set out these basic

dence of interests" of the early 20th century with their interpretation of law as a means of securing a compromise between conflicting interests.

⁷¹ R. Pound, *Social Control Through Law*, New Haven, 1942, pp. 114-15.

values (they are also "the jural postulates of civilised society in our time and place"), Pound adds that in a modern industrial society certain other postulates make their appearance, arising from "human wear and tear", and the obligation of social support for "unfortunates".

This corollary, expressive of the ideas which subsequently took shape in the loudly advertised "welfare state", is in reality an involuntary act of self-exposure by Pound, indicative of his indebtedness to Benthamite teaching. Since the plight of the "unfortunates" necessitates supplementary postulates, it would hardly be unreasonable to assume that the basic postulates had, and have, in mind the successful business man; indeed, a mere glance at the basic postulates shows that this is really the case. In introducing his categories of "value", Pound was obviously anxious to water down the pragmatic utilitarianism of his concept. But these categories are highly pragmatic. Here, too, he rejects such value criteria as the "good", the "kind" and the "just", that is, those criteria usually invoked by axiology. Pound's pragmatism is evident also in his substituting individual initiative for the social processes and, equally, in his rejection of any moral-value criteria of law.⁷²

Wholly applicable to Pound's scheme of interests to be secured and postulates of value is the comment by the Italian jurist R. Treves on some of the later trends in American sociology of law. These, according to Treves, are connected with the three "great contradictions which exist in this society: the affirmation of an egalitarian system of values contrasted with a highly accentuated social stratification; strong basic traditions of local and individual autonomy existing alongside an increasingly impersonal system of controls and communication; and the presentation of the USA as a nation of individual capitalists whilst, in fact, the true economic power is concentrated in the hands of relatively few people."⁷³

⁷² Pound's pragmatism, due chiefly to its eclecticism, is not nearly so pronounced as that of Holmes and other US theorists. A. S. Pigolkin characterised Pound as belonging to the "moderate wing" of pragmatism. (*Sovietskoye gosudarstvo i pravo* No. 9, 1960, p. 45.)

⁷³ *Norms and Actions*, ed. by R. Treves and J. F. Clastra van Loon, Hague, 1968, p. 4.

Another important feature of Pound's theory was his attempt to consider law in the light of the concept of a "social control", widely used in American sociological writing at the beginning of the century.

This idea, which owed much to the work of the Scandinavian sociologist Ross, was expressed, approximately, as follows. Human civilisation combines in itself two types of social control: the external, which relates to the influence exerted by man on nature and, second, the internal to which is assigned the function of controlling human nature as a complex interaction of the "social" and "aggressive" instincts. Morality, religion and law, which at the dawn of civilisation were indistinguishable from one another, are the chief means of social control. In the Middle Ages, morality and religion held sway. But they presuppose the patriarchal life and are totally inadequate to the needs of urbanisation. For the contemporary world the vital instrument of social control is law. The state, having assumed this function, realises it chiefly through the medium of law.

It will be noted that Pound, unlike most of his European colleagues, far from denying the organic association of law and state, places the emphasis on it. As a means of social control, the law expresses the aspect of permanent control exercised over the behaviour of the members of the given state-organised society by the political authority.

If we recall Pound's lamentations over the "disappointment" felt nowadays about law and the desire of nations to rule without law (mentioned earlier in connection with the fate of the juridical outlook), one could gain the impression that he lapses into a contradiction: on the one hand, law as the basic instrument of social control and, on the other, decline in the role of law. But when he speaks of people being "disappointed" with law, he means it in the traditional sense (in the second aspect of his three-pronged definition), that is, as the aggregate of stable general norms. On the other hand, when speaking of law as an instrument of social control, he emphasises that what he has in mind is a broad sociological definition of law with the foremost place assigned to "justice without law". Thus, once again, law—this time in the shape of social control—is adjusted to coincide with the present-day shift of emphasis in the mechanism of bourgeois state power

towards direct action by the executive authority and its administrative bodies.

There is nothing to quarrel with in the formula of law as an agency of social control. Law is indeed a means of influencing vital areas of the social relationships and human behaviour and in this sense it is a part of social control understood as the aggregate of prescriptions and restrictions, methods of persuading and convincing people, of enforcing and encouraging, all of which help in the shaping of the system of behaviour among the members of the particular society.⁷⁴ In this context, the concept of law as an agency of social control underlines the importance of detailed analysis, taking in the social psychology aspect, of the intricate process of translating the requirements of law into social behaviour.

In treating law as an instrument of social control one may also refer to its protective role, that is, to that aspect of its reciprocal effect on social life which is associated with consolidating and safeguarding the particular social relationships and the social behaviour that have already taken shape. Here, however, one should bear in mind that the overall social purpose of law and its reciprocal action on social relations are not confined merely to its protective functions and, likewise, to the formula of "law as an instrument of social control".

Discussing the problem of "law and social control", Talcott Parsons refers, on the one hand, to law as the all-embracing control mechanism (since it acts as regulator in all the main areas of social relationships) and, on the other, distinguishes it from social control mechanisms invested with the function of resolving the fundamental problems of the development of society. This duality, which may appear contradictory, derives from the fact that Parsons, incorrectly, ascribes an exclusively protective function to law: protection against encroachment, restoration of the situation as it was, settlement of disputes, etc.⁷⁵

The defect of American sociological jurisprudence lies not in its "social control through law" formula, but rather in the

⁷⁴ See Y. Szczepanski, *Elementarne pojecia socjologii*, Warszawa, 1966, pp. 116-17.

⁷⁵ T. Parsons, "The Law and Social Control", *Law and Sociology*, ed. by W. M. Evan, Glencoe, 1962, pp. 56-72.

content of the formula and in its interpretation of the control mechanism.

For the Marxist, "social control through law" is seen as the influence exerted by law on the social environment, an influence which by its nature is a class influence. In sociological jurisprudence, this control is not seen as having any clear-cut socio-political characteristics. On the contrary, it appears as non-class. The capitalist state and law once again (and how many times) are seen as being above class, extra-class organs with the functions of reconciling social antagonisms, conflicting urges, and so on. We recall the Pound construct where for the *n*th time in bourgeois social thought we encounter the Robinson Crusoe situation when law has only one man and his instincts to deal with and instead of being a means of reinforcing a certain social system becomes an instrument for the direct control of human instincts.

This construct lacks any clear indication of the real social nature of law, without which there can be no explanation of the mechanism of its reciprocal action on the involved range of social relationships and on man, who should be seen not as a remote island but as the pivot of these social relationships.

In the Pound construct, the actual social phenomena are presented in a mystifying fashion, as the reflection of man's proclivities, influenced by social control through law. Pound's view is that, given this control, and its effect on the aggressive instincts, violence in everyday life can be overcome. What this really implies is that the triumph of the capitalist system replaces non-economic compulsion by the economic compulsion on which the bourgeois law of contract rests. Pound asks whether social control through law should be extended to take in other human attributes and especially such attributes as guile and cunning. His answer is that it should not, since underlying attributes of this nature there could be a considerable fund of knowledge, ability and foresight, as is demonstrated by the contracts and agreements into which those possessing such admirable qualities enter. "Undoubtedly, men desire to be equal in all respects. But they also desire to be free."⁷⁶

⁷⁶ R. Pound, *An Introduction to the Philosophy of Law*, New Haven, 1961, p. 168.

This contrasting of equality and freedom is one of the favourite methods used to justify capitalist free enterprise. And Pound, who always comes to its defence, does so this time with his social control through law.

B. Dynamism or Stability of Law? An Imaginary Contradiction

Pound firmly believes that his concept of law, and especially its notion of the possibility of "justice without law", is more capable than any other of resolving a problem which he regards as basic, and which he formulates in the following way: "Law must be stable and yet it cannot stand still." This formula has greatly engaged bourgeois legal writing and its implications require some examination.

Dynamic and constantly in operation, yes, stagnation, no, such, as we have seen, was the Pound vision of law. It was a vision that featured in the very first ventures of the autonomous law movement and remained in its arsenal as an ideologised reflection of the real gap between the legislation of pre-monopoly capitalism and the new conditions of the imperialist era.

A certain part was played here also by the fact that, in contrast to the men of the Enlightenment, who regarded law as an instrument for the revolutionary reconstruction of society and the development of new and progressive social relationships and of the further evolution of man, positivism, reflecting the specific features of the established capitalist society, imparted to law a purely protective role that did not go beyond helping to reinforce the new order and thus froze ultimately and inevitably into a rigid conservatism. Had bourgeois sociological jurisprudence pinpointed this divergence between the legislation and the social dynamism—products of a specific concrete-historical situation—had it focussed attention on the conservatism of bourgeois law arising from its socio-class nature, all this would undoubtedly have been just. The "autonomous law movement", however, was wanting in the freedom to do precisely this. It never succeeded in getting beyond saying that law, or indeed any other pre-established legal norm, was, generally speaking, incapable

of steering a course that would bring it into harmony with the dynamism of social life. Only a free and ceaseless searching for law on the part of the judges could do this. In the words of the French jurist G. Cruet: "Every legislative act brings the law to a halt." Cruet's book, incidentally, appeared under the alluring title: *The Life of Law and the Impotence of Its Acts*.⁷⁷ The Cruet formula brings to mind the sophistry of Cratylus, the ancient Greek philosopher, who—paraphrasing the well-known words of Heraclitus "All is flux, nothing stays still. Upon those who step into the same rivers different and ever different waters flow down"—declared that in the case of law one could not step even once into the same stream. The Cruet formula is nonsense, if only for the reason that it runs counter to the entire history of law and to the rise of state-organised society generally and of capitalist society in particular. It derives, evidently, from misunderstanding of the plain fact that any lagging of a generally stable legal norm behind the social dynamic (this is perfectly possible and, what is more, even inevitable at times) is entirely due to the content of the given norm, not to the particular legal form as such and, in principle, the lag can be made good by means of the norm itself.

At first glance, it might appear that the disciples of American sociological jurisprudence were more cautious in their approach to this problem. B. Cardozo, one of the first to draw attention to it, disagreed with those Western researchers who, in his view, had gone too far in their rejection of the stability of law and its definiteness. A degree of stability was essential, but a stability in the sense of a sound definition. "Rest and motion, unrelieved and unchecked, are equally destructive", Cardozo wrote. Hence, he argued, compromise should be sought in a "principle of growth". However, the "principle of growth" advanced by Cardozo as a means of arriving at a compromise between "stability" and "change", proved to be the same old recipe of the judge empowered to render judgement based either on law or on precedent and, if necessary, without either of them. "Sooner or later," he wrote, falling back on pragmatist criteria, "if the demands of

⁷⁷ G. Cruet, *La vie du droit et l'impuissance des lois*, Paris, 1908, p. 247.

social utility are sufficiently urgent, if the functioning of an existing rule is sufficiently productive of hardship or inconvenience, utility will tend to triumph."⁷⁸

This, basically, was also the Pound view. All the major differences and disputations in legal science derived ultimately from that which Pound held to be eternal—the contradiction between the dynamic and the stable. He expressed disbelief in the following terms: "... the social interest in the general security has led men to seek some fixed basis for an absolute ordering of human action whereby a firm and stable social order might be assured. But continual changes in the circumstances of social life demand continual new adjustments to the pressure of other social interests as well as to new modes of endangering security. Thus the legal order must be flexible as well as stable. It must be overhauled continually and refitted continually to the changes in the actual life which it is to govern. If we seek principles, we must seek principles of change no less than principles of stability."⁷⁹

Obviously, any evaluation of this statement will depend in large measure on how one understands the "principles of change". It will be one thing if they are placed in the legal frame. Should they, however, overstep the boundaries of legality, little would remain of the stability principle. The Pound offering provides no guarantee against this, since his basic means of softening or of even eliminating the contradiction between the "stability" and the "change" is his "justice without law", the last link in his triadic definition, that is, when the court creates new law without being bound by existing legislation or precedent.

True, Pound makes the reservation that application of the principles of change to the economic sphere via "justice without law" should be accompanied by the utmost caution due to the binding nature of "stability of contract and vested

⁷⁸ B. Cardozo, *The Growth of the Law*, New Haven, 1924, p. 117. It should be said that in the conditions which prevailed in the United States in the first decades of the 20th century, the urgency of adapting law to the changes in social life corresponded to the liberal view which, with regard to law, was at odds with the firmly-entrenched conservatism.

⁷⁹ R. Pound, *Interpretations of Legal History*, Cambridge (Mass.), 1930, p. 1.

interests". In more everyday usage, this means that "justice without law" should not impinge too much on the stability of the rights of free enterprise. In all other respects it is completely free, since the precise criteria needed to define the exact moment when change qualifies for priority over stability are non-existent whereupon "justice without law" comes into its own.

There can be no doubt that legal practice can be, and is, helpful in bringing out and also in ironing out differences likely to arise between the earlier established norms and the new phenomena coming to the fore in everyday life. This is especially so in countries where common law and other systems of law play an important role. It is often a court hearing that first brings to the fore those new factors, trends and conditions which necessitate changes in law. Judgements and rulings which subsequently enter into legislation often have their origins in judicial practice. It can, therefore, be most helpful in forestalling possible tensions between a stable legal order and an actual law situation. On the other hand, if judicial practice is extended to dispensing "justice without law", as proposed by American sociological jurisprudence, the results would be more likely to be of a reverse order—too great a departure from stability. Moreover, in considering the "principles of change", it should not be forgotten that the place of the courts in public life and the materials at their disposal are such that they enable them to judge the possible obsolescence of the general norms arising from change in the social milieu; this, however, is not to say that, as distinct from the legislator, they have the opportunity of taking an all-round approach to the problem (the use the bourgeois legislator makes of his opportunities is, of course, a different matter).

The spokesmen of US sociological jurisprudence identify, without adequate grounds for doing so, law stability with changelessness in the absolute sense. In their eyes, a stable law is a congealed, frozen law. The reality, however, is that the dialectic of life is such that a stable legal order always presupposes a certain element of change, an adaptation of the actual law to the social development. It is indeed the lag, the inability to change that can lead to imbalance in the stability. True, law stability and legal order are interrupted by revolu-

tionary and other qualitative changes, but these being special problems do not come within the vision of sociological jurisprudence. Its disciples, when speaking about social changes and changeability in law rarely go beyond modifications well within the frame of the capitalist system, modifications rendered necessary by internal development; we recall that Pound in his reflections on social change is at one with E. Ross for whom social change (with due regard to the importance allotted to it in his sociology) is never identified with a really fundamental change in the social system. What is more, Ross is very much against those aspects of social change of a "negative" or "destructive" nature.⁸⁰

W. Friedmann, reproducing the Pound formula that while "law must be stable and yet it cannot stand still", enumerates "the principal antinomies in legal theory".⁸¹ In discussing the "stability and change" antinomy, Friedmann confuses two aspects of the problem: the real relationship of stability and change in law and in the legal system of society, and the reflection of this relationship in the legal ideology. He notes that some bourgeois doctrines put the accent on stability of the legal system, while others place it on the need for change. This, however, comes nowhere near to proving an irreconcilable antinomy between stability and change in the law itself. It is merely indicative of the one-sidedness of those legal doctrines that fail to take in the complicated process of the evolution of law and of the legal system in a developed state-organised society and, arising from this, the exaggeration of one or another aspect of this process.

C. The Realist School

The so-called realist trend in American jurisprudence took shape during the inter-war years and even more clearly

⁸⁰ See G. V. Osipov, *Contemporary Bourgeois Sociology*, 1964, p. 287 (in Russian).

⁸¹ W. Friedmann, *Legal Theory*, London, 1960, p. 32. The antinomies are as follows: individual and universe, voluntarism and objective knowledge, intellect and intuition, stability and change, collectivism and individualism, democracy and autocracy, nationalism and internationalism.

delineates the pathways of sociological jurisprudence in the United States. Adopting a negative attitude to the traditional positivist theory, realism struck at the very heart of this theory—objective law, understood as the aggregate of laws, obligatory precedents and legal principles, etc.

The approach is not exactly a new one. In the 1880s, long before the advent of sociological jurisprudence, Woodrow Wilson, who subsequently became President of the United States, expressed the view that "it is one of the distinguishing characteristics of the English race whose political habit has been transmitted to us through the sagacious generation by whom this government was erected that they have never felt themselves bound by the logic of laws, but only by a practical understanding of them based upon slow precedent. For this race law under which they live is at any particular time *what it is they understood to be*; and this understanding of it is compounded by the circumstances of the time".⁸²

This was partly due to American law having its origins in precedent, with the result that for a long time the role of law was regarded as secondary. The view that before the law could be enforced it had first to be interpreted by the judge (and thereafter accepted as precedent) led to the belief (or at any rate, cleared the way for the belief) that the law was simply the material which the judge had at his disposal. This is the beginning of "legal realism". J. Gray, one of its founding fathers, wrote: "... it has been sometimes said that the law is composed of two parts, legislative law and judge-made law, but, in truth, all the law is judge-made law."⁸³

It was Gray's belief that the law (statutes, legislation, etc.), should be regarded merely as the material with which the judge makes law, but not as the law itself. He adduces numerous examples taken from legal practice in support of his view. This brings us to yet another of the sources of legal realism and, indeed, of bourgeois sociological jurisprudence as a whole. This source is the actual widening of the judge's freedom to use his discretion as bourgeois society moved into its imperialist phase and the crisis in bourgeois law and the legal order became evident. At this juncture

⁸² W. Wilson, *The State Elements of Historical and Practical Politics*, Boston, 1907, p. 463.

⁸³ J. Gray, *Nature and Sources of the Law*, New York, 1938, p. 125.

the English jurist Frederick Pollock commented: "... many judicial opinions are unintelligible save upon the assumption that the judges did not like the effect of the legislation they were asked to interpret, and did their best to construe it away."⁸⁴

The US realists delight in quoting these words and even more often invoke the statement by O. W. Holmes to the effect that law is not logic, it is experience and the law should be understood as nothing more than a prediction of how the court will act. Holmes's description fits in nicely with the following words by Gray: "... suppose Chief Justice Marshall had been as ardent a Democrat (or Republican, as it was then called) as he was a Federalist. Suppose, instead of hating Thomas Jefferson and loving the United States Bank, he had hated the United States Bank and loved Thomas Jefferson, how different would be the law under which we are living today."⁸⁵

The viewpoints just cited reflect—some more, others less—a quite definite social situation. In some instances, relating especially to progressive legislation, acts have been rendered null and void by the judges. For law to develop, since (contrary to the views of some positivists), its logical processing is not enough, there must be guidance based on social experience, but a guidance not in the pragmatic sense of "experience" as suggested by Holmes. Under a regime of legality, the law certainly predicts the behaviour of the judge, but there is more to it than that. Finally, there are subjective factors which can influence both the evolution of law and its content, but only within certain limits, and most certainly not as Gray imagined.

Legal realism, regarding these postulates as absolutes, carried them to the extreme, if not to the absurd. The more moderate of the realists—moderate in the sense that they attached a measure of significance to the legal norms—were in much closer affinity with Pound's Harvard school. But this group, too (Llewellyn, Garlan, Patterson), and others even more consistent in rejecting the role of law (Frank, Oliphant

⁸⁴ Quoted by H. J. Laski, "The Judicial Function", *Politika* No. 6, 1936, p. 122.

⁸⁵ J. Gray, *op. cit.*, p. 226.

and Arnold) were unanimous in saying that legal norms should be excluded from the concept of law, as a specific social phenomenon established by the courts and, as distinct from the "rigid norm", evolving all the time.

"What is medicine?" the realists ask, and they answer: medicine is first of all the function of the doctor treating the patient, hence its meaning and purpose.⁸⁶

And similarly with law; in the event of its laying claim to social effectiveness, it must be seen as the work of persons empowered to resolve disputes and other matters, that is, the judge and the administrator. Hence the basic thesis of the realists: law is that which is made by the judge in his professional capacity. It must be emphasised once again that this has nothing to do with the law of precedent. For realism's liking of precedent is as scant as it is of law. Its starting point is that as a phenomenon, law, jointly with society, is in constant flux. Any inert form, be it law or precedent, results in a standstill (recall the Cruet-Pound formulae). Constant change is needed in law, and the change is possible only if law-creating rests with the judge. Law in the realist schema consists not of rules (law and precedent always imply rules), but of empirical decisions. Governor Willie Stark, one of the characters in R. Warren's book, *All the King's Men* (the action of the novel coincides with the rise of realism) speaks the language of the realists: "Hell, the law is like the pants you bought last year for a growing boy, but it is always this year and the seams are popped and the shankbone's to the breeze. The law is always too short and too tight for growing humankind."⁸⁷ For the realists law is what is usually described as "creeping empiricism". With Kelsen, the world of facts disappears, with the American realists the same fate overtakes the normative nature of law. By the same token, the all-important interaction of the particular, the individual and the universal goes overboard.

⁸⁶ "To define the law as what the courts will decide is, as others have pointed out, like defining medicine as what the doctor will prescribe—it misses the question which faces the doctor..., viz., what he *should* prescribe...", reasonably remarks M. Cohen in his book *American Thought. A Critical Sketch*, New York, 1962, p. 217.

⁸⁷ R. Warren, *All the King's Men*, Bantam Books, New York, 1959, p. 136.

The realists plump wholeheartedly for all the conclusions deriving from their interpretation of law, an interpretation which nullifies all stability in law and in the legal order. That, they reply, is as it should be, since stability-seeking is "a legal myth",⁸⁸ conjured up by the lawyers of the last century. Surely if physicists can proclaim the "principle of uncertainty", it would be absurd to expect to realise even approximate certainty and predictability in law.⁸⁹ "...Why do men seek unrealisable certainty in law? Because, we reply, they have not yet relinquished the childish need for an authoritative father and unconsciously have tried to find in the law a substitute. ..." So writes Frank in his endeavour to transfer to law the Freudian concept of the origins of religion.⁹⁰

Frank makes a distinction between the "actual law", (that is, the judicial decision already taken) and the "probable law" (the presupposed judicial decision). In this classification, which Frank describes as a "working definition" of law, there is no place for the subjective-law category, for prior to the judicial decision it has no existence. The question arises what becomes of the constitutional rights and freedoms, including those guaranteeing the citizen against arbitrary action by the courts. The realist conception, far from making these rights into something "safeguarded" and "guaranteed", as some of its disciples have assumed, actually leaves the citizen defenceless in relation to the courts and other state agencies.

In the United States the realist view, which has had a considerable influence on the specialised branches of legal science, has been applied to some of the problems of these branches. By way of example, one could cite international private law. In line with the traditional Anglo-American doctrine, the law of other lands, referred to as conflict-of-laws norm, is regarded merely as a factual circumstance, having some essential bearing on the case; at the same time the courts recognise the legal powers arising from the operation of this law. W. Cook and other realist writers, accepting the first part of the formula, (the law of another land as a

⁸⁸ J. Frank, *Law and the Modern Mind*, London, 1949, pp. 11-12.

⁸⁹ *Ibid.*, p. 7.

⁹⁰ *Ibid.*, p. 21.

fact but not a norm qualifying for application), reject the second part, saying that the judge cannot admit the legal powers ensuing from the law of another land. The explanation offered is that, in the realist view, competence must await the verdict of the judge, since the law is made by the judge.⁹¹ In effect, the American judge, examining relations in the area of international private law, even when they refer to the law of another land, is given theoretic grounds for ignoring that law and the foreign elements of juridical relations *in toto*.⁹² In this connection, the French jurist H. Batiffol, with every justification, described the realist thesis concerning the impossibility of the existence of subjective rights until the judge delivered his verdict as "intellectual shortsightedness".⁹³

If law is the functioning of the judge in its perpetual adaptation to the changing social milieu, it is natural to ask what are the social factors on which it is based. From the manner in which law is perceived by the realists, one would be justified in expecting from them a serious and all-round social and political scrutiny of the problem. But nothing of the kind is forthcoming; the realists turn the socio-political base of justice into a psychological one. In their view, legal science, prior to their arrival on the scene, gravely neglected psychological analysis of the legal processes, including the court processes, whereas these processes are nothing more than a "psychological act". The view expressed by Frank, whom we have quoted above, is that we must go back to Freud for an explanation of this act. Another author (H. Oliphant) has suggested that better results might be obtained by invoking behaviourism.⁹⁴

⁹¹ W. Cook, *The Logical and Legal Bases of the Conflict of Laws*, Cambridge (Mass.), 1942.

⁹² For a detailed critique of Cook's views see L. A. Lunts's "Some Aspects of the American Doctrine of International Private Law" in *Problems of International Law in the United States Theory and Practice*, Moscow, 1957, p. 164 ff, and also *Problems of International Private Law*, Moscow, 1956, p. 226 ff (in Russian).

⁹³ N. Batiffol, *Traité élémentaire de droit international privé*, Paris, 1949, p. 347.

⁹⁴ The "psychological study of judicial process" was advanced by Pound somewhat earlier when he enumerated the functions of sociological jurisprudence.

According to Frank, by far the best description of judicial process is Judge Hutcheson's. Hutcheson says that, having acquainted himself with the state of affairs, he gives rein to his imagination, and reaches his decision on the basis of "feeling" and "inner impulse", not logical argument. The logical and jural arguments, according to Hutcheson, come later when the judge formulates his decision, which is actually based on the inner impulses.

Frank, delighted with this evaluation, declares that the source of the judgement and consequently of law is, in the realist understanding of jurisprudence, not in the legal act, not in precedent but in biological impulses of every conceivable kind, in prejudice, antipathy and other factors of a like nature which influence the judge psychologically. The judgement is essentially irrational, and it is only later that the "process of rationalisation" sets in, that is, the concentration on the legal argumentation with which to uphold it.

True, since the judge is also human, psychological aspects and emotion enter into the performance of his functions. That intuition plays its part in judicial and investigatory practice is certain. But for anyone to assert that these particular aspects are decisive would be sheer profanation of justice. And if the theorist Frank is intoxicated with the description provided by Judge Hutcheson, what, we wonder, would be the reaction of the learned judge upon making the acquaintance of Frank's notion of how justice is dispensed.

In the minds of the realists the judge is not an element in the machinery of state, nor does he stand for any particular social forces; in their view, he is a biological individual who acts in conformity with deeply felt psychological promptings or external irritants.

Incidentally, wholly applicable to the activities of the judiciary is the view expressed by Lenin that the thoughts and feelings of specific individuals derive "... necessarily from the given social environment, which serves as the material, the object of the individual's spiritual life, and is reflected in his 'thoughts and feelings' positively or negatively, in the representation of the interests of one social class or another".⁹⁵

⁹⁵ V. I. Lenin, *Collected Works*, Vol. 1, p. 405.

Realistic jurisprudence, of course, does not confine itself to the person of the judge. K. Llewellyn, for example, insists that law is the result of the activity not only of the judge but of any state official. "Administrative function as law" is a recurring theme in his thesis. "Hence I argue," he writes, "that the focus, the centre of law, is not merely what the judge does . . . but what any state official does, officially."⁹⁶ Llewellyn ridicules those jurists who profess to see law in the functions of the judge in a court of first instance, but who fail to see the same kind of functions, for example, in a clerk employed by the bureau of taxation.⁹⁷

It will be seen, then, that whatever particular point we examine in the realist teaching, we encounter a pronounced legal nihilism, an approach to law and justice which simply obliterates legality. The concept of judge-made law is seen in its most vulgar aspect.

Meriting attention, however, is the fact that in the early 1930s—the vintage years of realism—the teaching had a considerable following, counting among its exponents many liberals and supporters of Roosevelt's New Deal. Its strong point (as with the earlier Pound writing) was its critical approach to the traditions of American justice and to the state in which it was at the time. In a way, realism could be regarded as a revolt against the conservatism which by then had encrusted the legal forms, and even as an attempt to adapt the judicial system (true, in a highly specific way) to the requirements of the liberal reforms of those days.

This, however, does not alter the overall evaluation of realism as a vulgar trend in the bourgeois theory of law. In the years following the Second World War, many of its one-time disciples switched to the right in politics.⁹⁸

In European jurisprudence, too, realism came in a fairly critical appraisal. Alone among the critics A. Ross of the

⁹⁶ K. N. Llewellyn, *Jurisprudence. Realism in Theory and Practice*, The University of Chicago Press, 1962, p. 31.

⁹⁷ *Ibid.*

⁹⁸ On this point, see, in particular, O. F. Ivanenko, "American Sociological Jurisprudence and the US Supreme Court (Felix Frankfurter—theorist and judge)", *Works of the Higher School of Investigation, Ministry of Internal Affairs of the USSR*, Volgograd, 1969, p. 143 ff (in Russian).

Scandinavian or Uppsala school—pro-American and anti-communist in outlook—tried to establish some common ground with the transatlantic realism. "There should be", he writes, "good possibilities for a contact between Scandinavian and Anglo-American views in legal philosophy. In both these cultural circles a decisive tendency towards a realistic conception of the legal phenomena is traceable. . . ."⁹⁹ According to Ross, the most outstanding among contemporary law theorists is Frank. But whereas Frank's view, as we know, is that law is made by the judge, depending on his psychological state at the time, Ross goes even further and asks: why only the judge? Law, he says, is the psychological impulse of many individuals concerned in the law situation of a given individual. All legal phenomena, he continues, are determined by combinations of a psychological "interested behaviour attitude" and a "disinterested behaviour attitude", which are in an "inductive interaction". Ross calls this proposition a hypothesis that is sound because it brings clarity and consistency into legal problems which had been unclear before. Ross's argumentation is reminiscent of the proof adduced by Kelsen for his *Grundnorm* ("basic norm"). Here we should add that, in keeping with the position taken by the Uppsala school, Ross is critical of normativism and, in equal measure, of all the other doctrines tending towards an indefinable dualism of empirical facts and legal norms. In the Ross view, psychological interpretation of the vital problems of law (its essence, the element of compulsion and of obligation) overcomes this dualism, and it is here that he finds the justification for his view. For the realists, however, who simply dissolve the normative into the empirical, this dualism is non-existent.

As mentioned previously, in the years subsequent to the Second World War, the sociologically-oriented schools lost their leading place in US jurisprudence. Pragmatism's loss of ground in philosophy correspondingly reduced its influence on legal thought.¹⁰⁰ Although the fundamental ideas of

⁹⁹ A. Ross, *Towards a Realistic Jurisprudence. A Criticism of the Dualism in Law*, Copenhagen, 1946, p. 9.

¹⁰⁰ The collection of articles, *My Philosophy of Law, Credo of Sixteen American Scholars* (Boston, 1941), is permeated with the spirit of pragmatism. The same cannot be said of the symposium on *Law and Philosophy*, held in New York in 1963, although it was chaired by the

Holmes, Pound, Llewellyn and Frank are still current, both the Harvard and the realist schools have had their day. They are now feeling the pinch from the natural-law trend known as juridical idealism, concerning which we shall have something to say in the next chapter. Meanwhile, we merely note the endeavours of sociological jurisprudence to prove its attachment to the natural-law problematics and, by doing so, to keep up with the currently fashionable ideological trend.

Pound took several steps in this direction in the 1950s when, recognising the tempestuous "revival" of natural law, he introduced into his conception, along with his jural postulates, "positive natural law", which differs from the traditional interpretation of natural law.¹⁰¹ Due to the eclecticism of Pound's conception, the transplant was carried out without undue difficulty, particularly since the "positive natural law" designation is anything but clear.

Even more symptomatic were the efforts of the realists. H. Jones, for example, holds that this school has many points of contact with the natural-law doctrine and that it is certainly in much closer affinity with it than the analytical jurisprudence. He maintains that both realism and the natural-law doctrine are brought together by their critical attitude to positive law as an aggregate of norms, while the shifting of the centre of gravity to the judge does not contradict natural-law thinking, for did not Aristotle see "living justice" in the person of the judge. The "moral dimensions" of law, according to Jones, should be sought not in the norms and principles but in the process of responsible decisions which transform law, as a whole into life.¹⁰²

If we take the natural-law doctrine in its classical form, we have no great difficulty in divining that its critical atti-

late Sidney Hook, "the last of the pragmatists". Not without interest is the evolution of F. Northrop who has made the journey from Dewey's instrumentalism all the way to natural law, based on philosophical anthropology. (*The Complexity of Legal and Ethical Experience*, Boston, 1959; *Philosophical Anthropology and Practical Politics*, New York, 1960.)

¹⁰¹ *Law Quarterly Review*, 1952, No. 271, p. 330.

¹⁰² H. Jones, *Law and Morality in the Perspective of Legal Realism*, 61 Col. L. R., 1961, No. 5.

tude to positive law has little in common with the realist critique of law and the stability of legal principles. While the classical natural law condemned the positive feudal law for its content, for its caste privileges and for its particularism, it never condemned the legislative act as a source of law and its forms. On the contrary, it saw in progressive legislation the measures whereby positive law could be made to harmonise with the requirements of the natural law and its principles. Realism rejects both legislative acts and precedent precisely because it regards them as stationary forms.

Jones is certainly on solid ground when he scrutinises the evolution of the natural-law conception throughout the history of capitalist society. In reality, some of the variants of the "revived natural law" of the immediate post-war years came pretty close to the extremism of the realists in the criticism of positive law and, like them, shifted the legal system's centre of gravity to the person of the judge who in his "free search for law" would discover and give expression to the principles and the ideals of natural law, which, in turn, as distinct from the classical natural law, would be sufficiently relative and flexible in content. It was not mere chance that impelled Philip Selznick, in his article "Natural Law and Sociology", to express himself thus: "In this essay I shall attempt to state why I think this so and why I believe that a modern version of natural law philosophy is needed for a proper understanding of the law as well as for the fulfilment of sociology's promise."¹⁰³

The inclusion of the "moral dimension of law" in the realist conception is, obviously, a concession to the spirit of the times. Here, too, Jones defends in his own way the basic thesis of realism. Morality and justice are categories vital to any evaluation of the processes of applying the law, but the problems of law and justice, law and morality relate not only to the processes of law, they are every bit as vital to law evaluation in the objective sense. Jones, however, maintains a typical realist position in excluding the legal norms and principles from the "moral dimensions of law".

¹⁰³ *Natural Law and Modern Society*, Cleveland and New York, 1963, p. 156.

7. FROM SOCIOLOGICAL JURISPRUDENCE
TO JURIDICAL SOCIOLOGY

The heading to this sub-section is not a play on words. It relates to the new, or at any rate relatively new, approach to the aims and methods of the sociology of law which made its appearance in Western law studies at the beginning of the 1960s. Basically, this new approach was a kind of delayed reaction by legal science to the wave of empiricism and even "hyper-empiricism" which in the previous decade had billowed in bourgeois sociology.¹⁰⁴ Just as the latter, with its watchword of "empiricism against the speculative approach" had turned away from general sociological systems, this new trend,—true, in a more moderate way and without that "empirical exaltation" which had featured in the previous sociological writing—spurned the idea of establishing general law theories.

The Italian jurist R. Treves, who did much to give organisational shape to the new trend, pointed out that "although there obviously still remain certain links between the present meaning attached to the sociology of law and that attributed to it by authors in the past [Treves had in mind Ehrlich, Weber and Timasheff—*U.T.*], it is not possible to establish any direct identity of meaning between the two concepts in whole or in part or in relation to their respective subject-matter or aims. The present sociology of law is, in fact, an entirely new field of study with a basic objective of promoting."¹⁰⁵ In much the same fashion, the West German sociologist K. Zwingmann insists that the earlier law schools in Germany, the "autonomous law movement" and the "Interessenjurisprudenz" in particular, were concerned much more with law than with sociology; the American writer G. Skolnik affirms that "... while the realists set a stage for legal sociology they cannot be considered as the progenitors of law".¹⁰⁶

The disciples of this trend are emphatic in declaring that,

¹⁰⁴ For details see G. M. Andreyeva, *Contemporary Bourgeois Empirical Sociology. A Critical Essay*, Moscow, 1965 (in Russian).

¹⁰⁵ *Norms and Actions*, pp. 1-2. Treves is President of the International Committee of the Sociology of Law, which is affiliated to the International Sociological Association.

¹⁰⁶ *Ibid.*, pp. 163-65, 273-74.

as distinct from sociological jurisprudence, this trend is completely autonomous in relation both to the general theory of law and the state, that it has nothing whatever to do with legal theory. Some of them see it as a branch of sociology, understood in the modern empirical not the traditional sense. Others prefer to describe it as a discipline independent of both the general theory of law and of sociology. Still others adhere to the view that its basic function, concrete empirical research, has nothing whatever to do with the question—in their view, not one of principle—whether this new discipline relates to legal theory or sociology. All three positions reflect a distinct claim on the part of the sociology of law to be independent of the science of law and the general theory of law.

The starting point of the sociology of law and, indeed, its basic point is concern for the application of specific sociological methods in law research. Not surprisingly, its attention is drawn to those areas in which application of such methods has been most effective, for example, researching the careers of judges and other law officers, motivation in judicial decisions, public opinion, evaluation of law, and so on. As regards method, the stress is on using the techniques of empirical analysis in the social sciences. These include the use of documentary and statistical material and also the techniques of investigating "living material", that is, man himself, his views on life and his behaviour (questionnaires, interviews, tests, and so on).

Such techniques and methods are, of course, useful in resolving legal problems. Soviet researchers, too, both in law and in the other social sciences, make full use of them.¹⁰⁷ And in law researches in the capitalist countries, especially when carried out along democratic lines (as, for example, in Italy where R. Treves, jointly with the Society for the Prevention of Crime and Social Defence, researched the careers of judges) can yield valuable material relative to the social and political processes taking place beyond the walls of the palaces of justice, that is, in areas rarely visited by positivist jurisprudence. At the same time, concrete sociological

¹⁰⁷ In this respect, socialist writers on the subject prefer the term "sociology of law".

investigation of this nature may be the answer to the reactionary social imperative or it may be reduced to a seemingly scientific confirmation of banalities.

Concrete investigations require a clear understanding of their place in the overall theoretic-ideological process of cognition with care being taken to avoid any exaggeration or overestimation of their role, particularly in the general context of scientific cognition of the world of law.¹⁰⁸

Marxism sees methodology in the unity and indissoluble association of (1) its theoretical and philosophical aspects as the application of philosophical principles to the cognitive processes (dialectics being the universal method of scientific cognition) (2) as the use of both abstract-logical or theoretical methods, and (3) specific scientific or specialised methods. Soviet sociological literature speaks of the methods and the techniques (or procedures) of research, emphasising thereby the distinction between the technical methods and the philosophical methodology and also the specific nature of empirical social research compared with the application of general methodological principles of progress in scientific knowledge. Marxism rejects the separation frequently encountered in Western literature on the subject, of those "social" sciences employing the modern empirical and mathematical methods of research (sociology, demography, economics, psychology, mathematical linguistics, and so on) from the "humanities" as being confined to the historical, typological and other "speculative" approaches to social life.

In the actual process of the materialist cognition of society, empirical quantitative analysis is both the natural supplement and constantly reproductive element for theoretical, qualitative analysis. Marxism, moreover, is alert to the possibility of the exaggeration of technical methods and procedures, of treating them as omnipotent, equivalent if not to the philosopher's stone, then certainly to the sociologist's.

¹⁰⁸ As noted by Kazimirschuk, "it should be borne in mind that in research of this nature one frequently reads descriptions not of the actual consequences of the law in action, but the reflection of these in the minds of the participants in the given social relationships" (V. P. Kazimirschuk, *Law and the Methods of Its Study*, Moscow, 1965, p. 156, in Russian).

Juridical sociology, as is the case with bourgeois empirical sociology as a whole, attaches too great a significance to empirical research and its potential. This becomes its basic equipment, its only method.

True, by the time juridical sociology had got into its stride, the wave of empiricism which had all but submerged the bourgeois science of law began to recede and voices were raised against what was now described as a "hyperfactualisation" (M. Duverger) and as a "divorce of the concrete researches from political theory" (B. de Jouvenel); juridical sociologists now urge the need to break out of the purely empirical frame and, in particular, to elevate the data obtained to a higher theoretical level. According to Skolnik, "the most important work for the sociologist of law is the development of theory growing out of the empirical, especially institutional, studies".¹⁰⁹

But this poses the question: what is implied by this higher theoretical level emerging from the empirical study of legal problems? Evidently, a development and deepening of the theory of law (provided, of course, that the latter is not conceived as a dogmatic descriptive science), of posing new problems. The results of a specific sociological study of legal problems, for example, the social effectiveness of any legal institution, could be submitted directly in the form of practical recommendations (juridical sociology scholars attach considerable importance to this aspect), but their elevation to a higher theoretical level is possible only within the theoretical frame of the corresponding civil, criminal, procedural and other branches of law and, by the same token, the general theory of law. This alone shows how wrong is the division created by representatives of juridical sociology between it, as an autonomous discipline, and the theory of law.

This division cannot be sustained in practice in an other respect. Even when we grant that the object of any empirical research might be deduced from immediate experience (although this is far from being the general rule) the prelimi-

¹⁰⁹ *Norms and Actions*, p. 187. By institutional researches, Skolnik, as is the case with Evan and other American writers, means the study of law in its interaction with other social institutions in the course of their general effect on specific processes, spheres and sectors of social life.

nary guidelines and points of departure can be provided only by the science of law. In practice, this link can be traced without undue difficulty. A mere glance at the primarily quantitative methods used in the United States in researching the behaviour of judges shows that such a research derives from the realist understanding of law and other postulates of American sociological jurisprudence.

Another point meriting attention is that juridical sociology, in addition to proclaiming itself independent of the theory of law, claims a monopoly of the sociological instrumentation essential to legal research. What remains unclear is why the logical, historical, comparative and some other methods of investigation remain within the competence of the general theory of law, whereas the specific sociological research is taken out of its hands, although all these methods should be interconnected and should form a single methodological complex. S. Lambrecht, a West German sociologist, was certainly right in saying that the good lawyer should be trained to think in terms of the sociological, but he was far from right in suggesting that sociological thought begins only when the lawyer makes his exit from the positivist frame.¹¹⁰

However, it is not only juridical sociology's theoretic standpoint that is vulnerable. One cannot help noticing the discrepancy between the role it allots to specific sociological research and the actual scale on which this research is conducted in the capitalist countries. It is possible to speak of some such system of research only in the United States¹¹¹ and Scandinavia,¹¹² whereas in the other Western countries so far it is mostly of a sporadic nature. And another, even more relevant point is that although some of the research has yielded interesting factual material, the subjects researched are, as a rule, enclosed in narrow confines and, even taken as a whole, still leave bourgeois legal thought a long

¹¹⁰ S. Lambrecht, *Die Soziologie*, Stuttgart, 1958, S. 242.

¹¹¹ For researches in the US on the judiciary see A. Starchenko, *Philosophy of Law and the Principles of Jurisprudence in the United States*, Moscow, 1969, pp. 79-95 (in Russian). The so-called Wisconsin programme envisaged participation by lawyers in studying a comprehensive problem—the social status of drivers-owners of trucks and taxis while Northwestern University undertook a comprehensive study of divorce and tax payment.

¹¹² See, in particular, *Acta Sociologica*, Vol. 10, Nos. 1-2.

way from resolving the basic problems of the science of law. It is worth noting that juridical sociology makes no secret of its desire to get away from these problems. As the Soviet researcher Nedbailo has noted, in bourgeois studies the sociology of law is merely an applied sociology and "leaves out law as an independent, substantial reality, replacing it by various factors of social life".¹¹³

¹¹³ P. E. Nedbailo, *Introduction to the General Theory of State and Law*, Kiev, 1971, p. 99 (in Russian).

Chapter Four

CONTEMPORARY BOURGEOIS LEGAL PHILOSOPHY. NATURAL LAW

1. GENERAL OUTLINE OF THE CONTEMPORARY BOURGEOIS PHILOSOPHY OF LAW

For a long time law was an undifferentiated part of the philosophical system.¹ For many of the famous philosophers, especially those of the Enlightenment and the German classical philosophy, the philosophy of law was regarded not merely as an effort to comprehend law as a special phenomenon, but also as the form of social philosophy substantiating one or another political organisation of society and its state structure. Marx expressed the view that the criticism of the Hegelian conception was simultaneously "... the resolute negation of the whole *German political and legal consciousness as practised* hitherto, the most distinguished, most universal expression of which raised to the level of a *science*, is the *speculative philosophy of law* itself".²

As legal science branched out it took over the wider problems of world outlook that had previously been the province

¹ "The science of law is part of philosophy" (G. W. Hegel, *Sämtliche Werke*, Bd. VII, Stuttgart, 1928, S. 30).

² "... the resolute negation of the whole *German political and legal consciousness as practised* hitherto, the most distinguished, most universal expression of which, raised to the level of a *science*, is the *speculative philosophy of law* itself" (K. Marx and F. Engels, *Selected Works*, Vol. 3, p. 182).

of philosophy. They were still often referred to as the philosophy of law, but bourgeois legal science had turned them into a general positivist doctrine on law and methods of juridical science far removed from the classical models.

In the complex socio-political situation of the 20th century, when the crisis of bourgeois legality had become apparent and the prestige of the law in capitalist society had suffered a rapid decline, bourgeois ideology felt the need to re-establish the link between law and the notions of "natural law", the "idea of justice", the supreme spiritual values, that is, the very criteria that positivism had dismissed as "metaphysical".

Right at the beginning of the century a search was begun for the ideal super-positivist principles which, it was held, would restore to bourgeois law its ethical inspiration. The slogan coined for the occasion was the somewhat high-sounding "revival of natural law". This, however, signified affirmation of the philosophy-of-law concept as a specific juristic discipline distinct from the general theory of law and pursuing the object of gaining recognition for its principles, retaining the while its own independent spiritual existence irrespective of whether recognition would be forthcoming or not. Radbruch, arguing from neo-Kantian philosophical positions, declared, for example, that since the idea of law related to the world of values, it could be cognised only by relying on the special method of evaluative examination which, of course, was the realm of the philosophy of law. Law, on the other hand, as a real element in life, should be studied by the theory of law. Neo-Hegelianism, too, drew a distinction between the philosophy of law and the theory of law, differing from neo-Kantianism only in insisting that the "law idea" should be understood in terms of objective idealism as the "spirit of law" independent of human consciousness.

In this understanding of the philosophy of law there was little that could be described as basically new. Hegel himself had referred to it in these terms: "Man is obliged to find the reasonable in law, consequently he is obliged to regard the reasonable as law," and he goes on, "it is with this that our [philosophical—*U.T.*] science is concerned in contradiction to positivist jurisprudence."³

³ G. W. Hegel, *Sämtliche Werke*, Bd. VII, S. 24.

In the 20th century, however, the distinction between the philosophy of law and the theory of law acquired specific features. In the first place, this was not a distinction between philosophy and jurisprudence, as it had been in Hegel; it was more of a demarcation of disciplines in the frame of legal science, of which the philosophy of law was now seen as a part. Second, the philosophy of law, in its 20th-century interpretation, was now in opposition not to positive jurisprudence but to the general theory of law, that is, a science on the theoretical methodological plane, which had evolved in the process of differentiation of jurisprudence. And third, this differentiation took place at a time when neo-Kantian postulates ruled supreme, erecting a kind of Chinese wall between the world of the "Is" and the "Ought", between facts and values, with the result that the philosophy of law found itself in a different category from the general theory of law and even more so from the sociology of law, its "ideal principles" being heavily marked as speculative and transcendental. The reservation should be made, however, that this did not prevent the philosophy of law from complying with the specific historical requirements of the bourgeoisie.

During the interwar years, the "revival" of natural law and the philosophy of law developed much more slowly than at the beginning of the century.⁴ One of the reasons for this was the rise of fascism in Germany with its totalitarian and racist doctrines, including also the reactionary neo-Hegelianism, and the crushing of the neo-Kantian philosophy of law wherever it displayed the slightest indication of liberalism.

⁴ In Soviet writing on the subject of law, the view is expressed that the distinction between the general theory and the philosophy of law had become so minute that bourgeois law itself lost all interest in them. (O. S. Joffe and M. D. Shargorodsky, *Problems of the Theory of Law*, Moscow, 1961, p. 17, in Russian.) Going back to terminology, it should be remembered that with the division of bourgeois legal studies into general theory of law, sociology of law and philosophy of law, each of the three terms (in the absence of a generalised one) is used not only in the narrow sense, but also broadly for the purpose of designating those works in which the authors display a tendency to combine all three orientations. In many instances the authors use the term philosophy of law not in the sense of a specific discipline, but in the broader meaning of a synonym for all legal thinking.

After the Second World War, natural-law ideology experienced a boom, when it joined in the search for ideal principles with which to buttress bourgeois law and legality so badly tarnished by fascism. As mentioned previously, reanimation of natural-law ideology is always to be observed during complex transitional periods of history.⁵ The post-war resurgence of natural-law ideology was accompanied by even more complicated circumstances of a socio-political nature—the division of the world into the capitalist and socialist systems and the remarkable progress of the latter. In this new set-up it was not only a matter of reflecting in ideology the inner contradictions in capitalist society, but also of seeking new ideas to counteract the power of attraction exerted by the socialist world.

The renewed attempts at associating bourgeois law with the higher spiritual principles and values resulted in greater emphasis being laid on a special role for the philosophy of law. A French journal specialising on the subject submitted a questionnaire to twenty-five legal experts for their views on the following questions: Is it your belief that the philosophy of law or the general theory of law can have a useful existence? Do you see any difference between the two concepts? If the philosophy of law really exists, what object does it pursue, what are its main subdivisions and methods? How would you define the relationship of this discipline with the other spheres of philosophy and the studies of law? In what way do practical legal experience and general knowledge of philosophy and history influence the role of law? How do you explain the current pronounced popularity of the philosophy of law?⁶

Those who responded to the questionnaire and also many other writers on law were unanimous in acknowledging an

⁵ Here is Jaspers on the point: "All over the world law is based on the political will—the political will to the self-assertion of a certain state system. Law, then, has two sources: the above-mentioned political will and the idea of justice. Whenever major events take place, such as radical change in the life of society, the word invoked is justice. At other times, people speak exclusively in terms of the law, and of legal justice which is regarded as absolute" (K. Jaspers, *Whither the Federal Republic of Germany?* Moscow, 1969, p. 217, Russ. ed.).

⁶ *APhD* Vol. 7, 1962, p. 83.

equal right to existence for both the philosophy of law and the general theory; as distinct from the general theory, the philosophy of law was concerned with the ideal foundations of law ("the idea of law", "natural law", and "justice"), explanation of its basic problems and concepts from the standpoint of ideal evaluative principles, and also epistemological problems. A distinction was drawn even between the "origins" of the general theory on the one hand and the philosophy of law on the other. The former could be traced back to Rome and to Roman jurisprudence, the latter to ancient Greece, to the philosophical thought in which all the "eternal" problems of law have their source.⁷

Most Western writers agree in saying that the philosophy of law is a part of jurisprudence not of philosophy.⁸ But in this case, philosophy itself is understood in a rather narrow sense. For instance, neo-positivism in law leans heavily on the linguistic philosophy. But being a variant of juridical positivism, it abjures supra-law values and natural law, and does not come under the heading of philosophy of law. The latter, according to H. Cairns, one of its American disciples, takes from philosophy its epistemological orientation, chiefly idealism as a teaching that has to do with the ideals and values in the light of which law should be comprehended.⁹ Cairns, like many other writers on legal matters, uses the term "legal idealism" as a synonym for the philosophy of law and for natural-law ideology. This designation has in recent times gained wide currency. In the given instance, the word "idealism" is used not in its direct philosophical meaning, but as indicative of those ideals and values associated with thinking in terms of law. These ideals and values may also be interpreted in the materialist sense. Be that as it may, what Western writers refer to as "legal idealism" is based usually on idealist (in the Marxist sense) philosophy and would be more correctly termed "idealistic *legal* idealism".¹⁰

⁷ W. Friedmann, *Legal Theory*, p. 5.

⁸ A different view has appeared in Italian literature. Kelsen regards philosophy of law as part of moral philosophy, or ethics.

⁹ H. Cairns, *Legal Philosophy from Plato to Hegel*, Baltimore, 1949.

¹⁰ Not every legal theory based on idealist philosophy can be qualified as "legal idealism". For example, the pragmatic view of law as expressed, say, by Holmes and Dewey, is certainly an *idealist doctrine*, but it is not "legal idealism".

The point is an important one. Modern bourgeois legal philosophy is always an idealist philosophy. Its "revival" and its further evolution are predetermined by the tasks of the struggle waged by bourgeois legal ideology against Marxist materialism. The "ideal" interpretation of law is counterposed to its socio-economic explanation. Much is said and said loudly, to the effect that the key to the spiritual and ethical aspects of law rests solely with the idealist philosophy of law. Hence the struggle waged by Marxism against this idealistic approach is depicted as a rejection of the vital role played in law by ideal principles and, it follows, by the philosophy of law as such.

In point of fact, Marxism rejects neither one nor the other. It readily acknowledges the substantial significance of ideal and value principles, but the principles themselves are explained from the standpoint of materialism, thus depriving them of any title to be a transcendental original source of law. The philosophical comprehension of law is a matter of primary importance in Marxism. Such comprehension, however, reached by way of application of the laws and categories of materialist dialectics, should include all the aspects and components of law as a complex of social phenomena, not just of any one particular area regarded as an autonomous object of the philosophy of law. The counterposing of the general theory to the philosophy of law is alien to the Marxist thinking on the subject, which sees their real need in terms of a monistic unity. The higher the philosophical level of the general theory and the more room there is in it for legal-philosophical problems (including the axiological) the wider will be the cognitive and methodological opportunities at its disposal.

We have already mentioned that in the 20th century bourgeois legal philosophy took shape chiefly along neo-Kantian lines, resorting to speculative constructions and transcendental categories and, more often than not, departed from the specific historical manifestations of positive law.¹¹ Not

¹¹ R. Pinto, with justifiable irony, characterised this discipline as a "comprehension of law minus law itself". This, however, did not prevent Pinto from acknowledging the need for a philosophy of law, since neither legal science nor legal sociology were in a position to cope with all the problems with which law confronts man (R. Pinto, M. Grawitz, *Les méthodes des sciences sociales*, Paris, 1967, p. 137).

surprisingly, therefore, as time went on, and especially towards the end of the 1960s, the "back-to-law" call was heard again in bourgeois legal philosophic literature. This call was, on the one hand, a reflection and, as ever, a belated one, of the need for a fresh view in bourgeois philosophy where all too long, for the purpose of overcoming the extremes of neo-Kantianism, the "back-to-things" idea had held sway, as a reaction to the enthusiasm of abstract "legal idealism" for *a priori* categories and speculative constructs. On the other hand, the call was associated with the declining interest in the "revived" natural law due to the growing role of positivism. Actually, throughout this phase, as we shall see below, this trend was less of an opposing of natural law to positivism than an attempt to bring them nearer.

In its philosophical aspect, the "back-to-law" call was an expression of the desire for an ontological theory of law. To legal philosophy was assigned the task of representing law not simply as categories of transcendental logic and axiology, and not just as a product and construct of consciousness, but above all of portraying it in its ontological aspect (ontology, it will be recalled, studies being as such, independently of the subject). Outwardly, this had all the appearance of a turn away from idealism in the direction of materialism. But let us not deceive ourselves on this point. What was really happening was that the neo-Kantian-based bourgeois philosophy of law was being replaced by phenomenology and existentialism under the growing influence of the legal theories of Husserl, Scheler, Hartmann, Heidegger and other bourgeois philosophers of the phenomenological and existentialist trend. Of the two trends, existentialism was the more widespread.

We shall take a closer look at the phenomenological school of law and existentialism towards the end of this chapter. For the moment we revert to the "revived" natural law and its place in the legal world of the immediate postwar years. We have noted that this doctrine appeared on the scene in a rather complicated philosophical form and also as a conception of lower ideological order. As we shall see, natural law remains, as hitherto, a vital category in the legal philosophical schools, regardless of their bourgeois philosophical leanings.

2. THE "REVIVAL" OF NATURAL LAW

The "revival" of natural law, which in the years immediately following the Second World War gained an enormous influence in the capitalist countries, and especially in West Germany and Italy, was not distinguished, outwardly at least, by anything that could be described as new or novel. As in the past, its proponents believed that, along with positive law, or above and beyond it, there existed certain ideal principles, values and ideas to which positivist law should correspond if it wished to retain effectiveness and function as "genuine" law. While positivism holds that the validity and efficacy of the legal norms derive from the fact of their issuing from a competent authority, chiefly a legislator, the natural-law doctrine holds that their validity and necessity stem from their harmonising with the "idea of law" and other natural-law criteria. It decries the positivist "law-is-law" principle and affirms that the only law worthy of the name is the "good law". So all we have to do is to define the particular kind of law qualifying for the title "good", to announce the criteria needed for the purpose and, lastly, to say who will appear in the role of arbiter. It is precisely at this juncture that we touch upon the kernel of the "revived" natural law. The point is not that this doctrine seeks ways and means of assessing the real content of law—a matter of first-rate importance—the point is where and how it searches, from the standpoint of which social forces, and what aims it pursues.

Engels put his finger on the genesis of the natural-law outlook when he underlined that justice as the measure of that which the jurists lump together under the heading of natural law, is always "...but the ideologised, glorified expression of the existing economic relations, now from their conservative, and now from their revolutionary angle".¹²

At the very dawn of capitalism, the natural-law doctrine of the Enlightenment reflected the existing socio-economic relationships in their forward-looking and progressive aspects. How do they look now in our modern times?

If we take, for example, the existing social, and especially

¹² K. Marx and F. Engels, *Selected Works*, Vol. 2, p. 365.

the production relationships on a global scale, on the scale of humanity as a whole, natural law could express their revolutionary aspects and, consequently, act as a genuinely progressive doctrine only in the event of its reflecting, at least in an ideologised form, the social relationships and principles of socialism. For on the global scale it is precisely these relationships and principles that comprise the revolutionary aspect of the organisation of the social life of modern man. Alas, from an approach of this nature the "revived" natural law is as far removed as heaven is from earth. As a law teaching, it sprang from the soil of capitalism, and on this count alone it, most certainly, can be regarded as a product of "Western society", a point dutifully laboured by its disciples.

The economic and political structure of capitalist society reflects the fundamental disharmony between the social nature of production and the private capitalist appropriation of the things produced. The everyday reality in the countries as yet under capitalist rule is, in all its basic spheres, that of contradiction and antagonism. In these circumstances, the natural-law ideas could also acquire a progressive significance by appearing as an ideologised reflection of the production and other vital social and political relationships in their revolutionary aspect. However, even this cannot be claimed for the "revived" natural law. It is the reflection, pre-eminently, of the capitalist relationships in their conservative aspect. Its ethos is defence of and support for private property and the capitalist way of life, as frankly acknowledged also by bourgeois writers on the subject. The French theorist P. Roubier finds that "this movement is far from being what it was in the 18th century, when it featured in the writings of those who opposed the existing society, when it displayed clearly-expressed revolutionary tendencies, whereas nowadays most of its writers are of a conservative hue".¹³

In West Germany, not surprisingly perhaps, large numbers of doctors of law and others associated with the legal profession, who had actively collaborated with the Hitler regime, hastened to announce their conversion to natural-law precepts. Evidently, for these gentlemen natural law (like

¹³ P. Roubier, *Théorie générale du droit*, Paris, 1947, p. 144.

the "Rechtsstaat") was nothing more than a piece of ideological camouflage.

Also not without interest is the fact that the "revived" natural law had many points of contact with the pronounced political and ideological clerical attitudes of the postwar years when the doctrine came under the influence of neo-Thomism. In the official teaching of both the Catholic and Protestant churches, natural law, interpreted in theological terms, has a special place, fits in nicely with the sanctity and inviolability of private property, and, equally, with the catch phrases of the neo-Thomist political philosophy, such as the principle of the "subsidiary", "social partnership", the "common weal" and the "common responsibility". In explaining the use of the word "revival", bourgeois writers, for example, H. Rommen, M. Villey, L. Siches and others are at pains to point out that it does not signify a return to the doctrine of the Enlightenment, that, on the contrary, it goes back to the more distant days of the "classical" natural law, that is, to its presentation in the works of St. Thomas Aquinas. Indeed, it would hardly be an exaggeration to say that never before has bourgeois legal thought been in such close company with theology as it is today in its adoration of the "revived" natural law.

The social and political role of the "revival" harmonises with the notion of "the historical community of the West" of which so much was heard in the immediate postwar years.¹⁴ Here, at last, it seemed, was an "encouraging possibility... of limitation of the sovereignty of independent states in favour of a supra-national authority".¹⁵

Nevertheless, in those early post-war years a number of genuinely antifascist lawyers, among them, for example, Radbruch, were sincere in believing that natural law was exactly what was needed as a counterweight to the ideological legacy bequeathed by fascism.

With its plethora of social shadings, the natural-law movement served as a useful ideological instrument for re-

¹⁴ See, for example, H. Thieme, *Das Naturrecht und die europäische Privatrechtsgeschichte*, Basel, 1954.

¹⁵ For details see G. P. Zhukov, *Critique of the Natural-Law Theories of International Law*, Moscow, 1961 (in Russian).

solving the grave difficulties encountered by the ruling bourgeoisie in the immediate postwar years. It enabled bourgeois ideology, for example, to draw a line between itself and fascism, to depict the latter as a purely transient and fortuitous aberration compared with the alleged immutability of the natural-law tradition in capitalist society. This invoking of the natural-law ideals was often in tune with the antifascist democratic aspirations of the bulk of the population and, simultaneously, helped to keep these aspirations within the principles of the capitalist system, of which historically the natural-law doctrine had been an ideologised expression. Thus the natural-law revival was an exercise designed to forestall any radical break with the ideological gospel of capitalism. It served, too, as a counterweight to socialist aspirations, as an obstacle in the way of social reform.

In West Germany, Italy and in other countries where the upsurge of antifascist feeling developed into a fierce political struggle, resulting in the adoption of new constitutions and the promise of far-reaching legislative renovation, the natural law revival came as a godsend to the bourgeoisie, and gave them scope for manoeuvre. Its "higher principles", on the one hand, justified those institutions which the ruling capitalist forces badly wanted to preserve and stabilise. On the other hand, the legislative reforms granted by way of concessions to the democratic, antifascist movement, but far from being to the liking of the reactionaries, were with the help of these supra-legal criteria condemned ideologically, and frequently juridically, because the judiciary, the watchdog of the constitution and the administration could make use of them. Practical utilisation of the natural-law idea was the basic feature of this movement in the postwar years.¹⁶

With the memory of Hitler and Mussolini fading away, the antifascism of the "revived" natural law likewise began to shed some of its recaptured élan. This shedding, however,

¹⁶ Marxist research on the use of natural law in West-German judicial practice shows that, apart from some application in trials of nazi war criminals and in the case of nazi law-violating legislation, it was used chiefly to counteract trends favouring a genuinely democratic development and a thorough-going denazification. See, in particular, W. Wippold (*Staat und Recht* N° 1 1959), E. Jakubowski (*Panstwo i prawo* No. 2, 1960, etc.).

did not prevent it from engaging in a "supra-law evaluation" of the norms of positive law, including those of a constitutional nature. Even in bourgeois legal writing it has been noted that many of the clauses in the Basic Law of the Federal Republic of Germany, adopted in 1949, subsequently became the subject of speculation, based on natural-law premises.¹⁷

The natural law movement reached its peak during the first postwar decade, a decade that also witnessed peak anti-positivist reaction in bourgeois jurisprudence. From West Europe the movement migrated to the United States, which was partly due to the burst of energy displayed at the time by Catholicism in that country. At the moment, natural law in the United States functions as one of the basic categories of "legal idealism".

As the 1950s drew to a close, the movement began to display all the signs of decline, acquiring a more abstract theoretic-philosophic form and a tendency towards integration with other legal trends.

In 1956, that is, towards the end of its decade of glory, E. Fechner set out in the form of questions seven points which, he claimed, would establish the scientific credo of the doctrine. The questions bring out clearly the problematics of the doctrine, and we reproduce them here for the purpose of providing a critical evaluation of the answers submitted by the bourgeois authors.

1. Are there in existence higher, permanently-operating norms which positive law must seek to emulate if it wishes to be 'richtiges Recht' law, or is law based on the will of the powers that be or on other fortuitous and variable factors?

2. If there are such absolute, permanently-functioning higher legal principles, where are we to seek their source: in reason, in an objective system of values, or in the will and the wisdom of God?

3. How does man arrive at cognition of natural law? Is his understanding of it derived from God, or is it conveyed by the voice of conscience? Or is there another way of cognising it?

4. How does one explain, granting the never-changing

¹⁷ OZOR Nos. 4-5, 1955.

eternal principles, the differences in the positive law systems arising among different nations and at different times in history?

5. What other factors, apart from the higher principles, especially "real" ones, contribute to the formation of positive legal order?

6. How is one to understand the higher principles, are they of a purely formal nature, or are they material in character?

7. If the positive law is at odds with the higher natural-law principles, how do the latter function? Are they merely guidelines for the legislators, or are they mandatory and invoked by the judge *contra legem*?¹⁸

Understandably, natural law supporters will have no difficulty in replying in the affirmative to the first of Fechner's questions. Indeed, if the natural-law idealism rejected the higher, supra-law norms and principles, all the other questions would be simply superfluous. What, exactly, is implied by these ideals, higher norms and supra-positive values? Post-war western legal writing has had plenty of ideas on this score. Some opt for the eternal, unchanging norms and principles regardless of the passage of time. Others are for the transient and the changing, since as with everything else under the sun norms and principles are subject to change, and, in place of the never-changing natural law they suggest one with a variable content. This definition, however, which goes back to Stammler, would seem to be lacking the dynamism needed for our modern times. Hence the appearance of a natural law interpreted in existentialist terms, in a state of continuous refashioning.

The followers of the school are divided into several groups according to their response to the question (the second in the Fechner list) concerning the origins of natural law. Some of these found the answer in objective idealism, for example, in neo-Platonism with its dualism in the world of things and the world of ideas, or in the eidetic variation of phenomenology. Still others saw natural law as the product of a depth psychology in its Freudian variation, or as intuitive law set forth in the terms of natural law. And lastly, there were those who divined in the content of natural law something

¹⁸ E. Fechner, *Rechtsphilosophie*, Tübingen, 1956, S. 183-84.

of the immanent, engendered by reason and by the higher norms and principles which are conveyed to the external world by reason. This view, which sees natural law blending in all its fullness with the "idea of law" as the basic category of legal idealism, has the biggest following. Many of the answers which associated natural law with axiology could be regarded either as an objective-idealist or subjective-idealist attitude to values. Recent bourgeois literature on the subject displays tendencies to regard natural law as a "rationalist description of reality" as the deduction of general principles "from study of the natural and the social world."¹⁹ This study, however, only rarely emerges from the realm of a primitive anthropologism and naturalism.

However, the arguments and debates notwithstanding, it would be wrong to exaggerate the distinctions in the approaches. Basically, from the standpoint of the "unitary function" of the doctrine, the distinctions are not all that important.²⁰ And the main reason for this is not the manner in which it made its appearance in the world, or its dynamism, or, on the contrary, its immutability, none of which provide any grounds whatever for a simple answer to the question concerning its content. The instances enumerated leave the road wide open to subjectivity. Generally speaking, the doctrine is not too much concerned with an exact enumeration and fixation of the higher norms and principles comprising its content. Its practical effect is largely due to their vagueness. It is no accident that, as distinct from the old classical teaching, the natural-law movement of the present day displays pronounced relativist tendencies.

It is not fundamentally important whether the higher principles belong to the realm of the formal (for example, "to each his own", although the "his own" can be interpreted variously) or that of the material, that is, of having a more definite content (the sixth of Fechner's questions), because in this case, too, the higher principles, are formulated subjectively or, at any rate, with ample room for subjective interpretation.

¹⁹ See, for example, *ARSP* No. 1, 1965.

²⁰ In the words of E. Wolf, while the natural-law concept may have many meanings, it has but a single function. (E. Wolf, *Das Problem der Naturrechtslehre. Versuch einer Orientierung*, Karlsruhe, 1955, S. 10.)

In a special article on the subject, J. Messner, an authority on neo-Thomism, took to task those who professed to see in natural-law principles nothing but empty formulae capable of any interpretation.²¹ His rebuke, however, smacks of the sham, of affectation. Is not this capability one explanation for the universality of the doctrine? It is another matter altogether that Messner dreads the thought of depicting the natural-law principles as something socialist or having a plain democratic or anti-clerical colouring.

The following circumstance is worth noting. If, for example, the authors of natural-law conceptions were to busy themselves with investigating the complicated process which resulted in the rise in the social and individual consciousness of ideals, moral postulates, values, and so on, with their pronounced bearing also on the legal aspects of social life, they could, possibly—even if in a confused, incomplete and one-sided manner—reflect some of the aspects and features of the process. But never at any time have natural-law researchers undertaken an investigation of this nature. The “higher norms”, the “idea of law”, and in like manner all the other categories which, in varying combinations feature in natural-law content are not the outcome of research into the complex processes taking place in the social psychology and in the social consciousness, but for the most part speculative premises on which the whole subsequent construct is built up.

That they are not the result of scientific analysis is strikingly evident also in the guide to cognition of natural law suggested in the third of Fechner's seven questions. Here we encounter yet another outburst of the irrationalism and the agnosticism that have bedevilled bourgeois law thinking throughout the present century. The perception of natural law is allotted primarily to divine revelation, intuitive searching, the voice of conscience, the spirit and other “organs of value cognition” (*Wertorgan*, according to Fechner).²² According to one line of thought, one simply presumes the presence of natural law as something that must be taken for

²¹ J. Messner, “Sind die Naturrechtsprinzipien inhaltslehre Formeln?” *OZOR*, No. 3, 1965, S. 163 ff.

²² E. Fechner, *op.cit.*, S. 186.

granted. And the onus of proving the contrary rests with those who dispute this view.

Kelsen has said, and not without justification, that the inner logic of natural law is such that in the end it leads directly to the idea of God. Replying to this, A. Verdross observes: "I am convinced that all of us are in agreement with the statement which proclaims that natural law cannot be substantiated without God. It is here that we come face to face with the problem: Is cognition of God derived solely from faith or is rational cognition of God possible?"²³

The error of the bourgeois philosophy of law in general and of natural law in particular is not in their addressing themselves to the legal ideas, values and ideals as such, but in their regarding them as basic to the evolution and assessment of law. In the process, this philosophy becomes a kind of double-barrelled idealism: on the one hand, totally ignoring the social and economic base of law, it presented itself as the result of spiritual principles and, on the other hand, the principles themselves are interpreted in an idealistic and fideist fashion.

A feature of the Fechner schema is that basically the principles which impart content to natural law are so formulated that three possible choices are available: subjective-idealist depiction of natural law as the immanent fruit of the human reason introduced by man into the world that surrounds him; the axiological (in the end, equally idealistic, bearing in mind the apprehension of values in bourgeois philosophy) and the theological. With only these three competing choices in the ring, the possibility of a materialist approach to the problem would seem to be ruled out completely.

From considering the presentation of natural law by bourgeois writers, we turn now to the view taken by the natural-law exponents of the positive law.

How did positive law originate? On what factors is it based? And of these which can be regarded as fundamental? What, from the standpoint of natural-law doctrine, is always regarded as the ideal principle? In the Fechner schema, we find reference to the "will of the powers that be" as one of

²³ OZOR No. 1-2, 1963, S. 117.

the "fortuitous" factors which exert influence on law; but the factor is "fortuitous" allegedly because the politically dominant classes and forces frequently change within the boundaries of each state, and whereas states come and go, law remains. This argument, however, tends to prove the opposite. It testifies that, all the different types and forms of state authority notwithstanding, authority always relies on the law, and law cannot exist without it; in the conditions of class-divided society authority always expresses the "will of the powers that be". In actual fact, the Fechner conception is the clearest confirmation that the natural-law justification of positive law is openly opposed to the Marxist class and materialistic approach to law.

Admittedly nowadays few of the natural-law following claim that it alone is the sole source of positive law, nor do they regard the latter as being influenced by the various kinds of "real factors". To do so would, clearly, involve them in trouble with the world of reality. In the foreground now is the conception of a "multiplicity" of factors, and it is to this that current bourgeois legal thought has recourse in tackling its many theoretic and methodological problems. In this conception the basic, the leading factors (economic and political) are, as it were, dissolved into other, also real, but less substantial factors and, most significantly, all of them taken together are subordinated to the one overriding factor of natural law, the "idea of law" etc., (it will be recalled that in the Gurvitch sociological schema a similar role was allotted to the "aggregate of acts of recognition"). In this connection, Radbruch adduced the example of the thinking that takes place in the mind of the sculptor, when choosing his material; should it be bronze, the result would be different from, say, marble. But the idea would still be the same. And the same goes for the "idea of law", which always has the last word.²⁴

Having proclaimed the idea as the demiurge of law, bourgeois legal philosophy finds itself confronted with the rather difficult problem of how to explain, given its invariable principles, the different positive law systems functioning among different nations and at different times in history

²⁴ G. Radbruch. *Einführung in die Rechtswissenschaft*, Stuttgart, 1961, S. 36.

(Fechner's fourth question). Bourgeois legal philosophy, however, has not yet produced anything even faintly resembling a satisfactory answer to this question. It is, of course, possible to speak about accidental "deviations", "deformations" and so on, which is what some bourgeois professors of law do, but in this case the entire historical process of the evolution of law is that of a consistent replacing of its various socio-historical types, of an endless chain of deviations from its foreordained principles. The obvious weakness of these explanations prompted a foray in other directions. It was now said that the existence of differing specific historical systems and legal forms need not be regarded as ground for rejecting the general concepts and ideas relating to law.

In itself, this assertion is perfectly sound. The multiformity of the individual and particular does not exclude but, on the contrary, presupposes deducing the general from the multiformity which provides it with existence. It is along this route that there come into being those allegedly *a priori* ideas and eternal principles which, later, are turned by the idealist philosophy into the immanent quality of the human consciousness or the "law spirit". Indeed, it is due solely to these origins that the *a priori* ideas and the "invariable principles" are able to reflect, true in an "ideologised" and mystical fashion, some aspects of the world of reality essential to an understanding of law. However, we are interested not in the foregoing assertion as such, but rather in its arguing a special role for natural law apropos the specific historical systems of positive law. In this respect, it is obviously being over-ambitious.

Let us turn for a moment to the views of the Italian professor of law, Del Vecchio. When he, championing the natural-law idea, claims that it does not run counter to the many and different legal systems, he is least of all interested in presenting his idea as reflecting the complex and variegated and constantly unfolding historical reality, an approach that would bring its content into clear relief. The natural-law idea, in his view, has its source in the human "I" itself, as a response to reason and conscience. Behind all the concrete manifestations of the legal reality, he avers, one should see the natural-law idea as the determining substance. "The rebuke levelled against the idea is that not always does

the reality furnish confirmation of it. . . . Yet natural law differs substantially from positive law in its asserting the deontological principle of what should be, even if it does not exist. It exists, because it is valid on the ideal plane, and it is valid even when it breaks down in practice. Violation suffered by any particular phenomenon does not invalidate the law which lies behind that phenomenon."²⁵

Thus we come back to where we started from, and "legal idealism" finds itself confronted once more with exactly the same question why, having been defined by one and the same substantive law, do the specific historical legal systems differ so greatly, especially in their affiliation to one or another of the different socio-historical types of law.

This tendency to regard the "idea of law" as the demiurge of law itself can be faulty in yet another respect. The Soviet scholar I. D. Levin, in a critical survey of this concept and its role as set forth by the French writer Burdeau, has drawn attention to this. Holding that, basically, law is a matter of faith and attitude, Burdeau argues that "the operative law, which is obligatory and observed by all, that is, the so-called positive law, is never anything but a contingent and transitory realisation of the idea of law".²⁶ What Burdeau actually includes in the idea of law is, in reality, as Levin observes, something much more comprehensive.²⁷ The fact is that the consciousness of the ruling class, as the direct precondition of law, embraces, in addition to law, the economic, political, ethical and other notions of that class. And to reduce all of these to the idea of law is an unjustified turning of the ideological sources of law into juridical phenomena and is every bit as wrong as the exclusion of the idea of law itself from the given list of sources.

Of course, it would be wrong to deny or to underestimate the part played by ideas, ideals and concepts in the genesis of law in the overall sense, and even more so in its taking the form of socio-historical types. Certainly this is not true of Marxism, for which law, far from being a mere mechanical

²⁵ G. del Vecchio, *Philosophie du droit*, Paris, 1953, p. 249.

²⁶ G. Burdeau, *Traité de science politique*, Vol. 1, Paris, 1949, p. 93.

²⁷ I. D. Levin, *Contemporary Bourgeois Science of State Law*, Moscow, 1960, pp. 177-78 (in Russian).

reflection of social life, is a complex reflection, via the class awareness, of the social relationships and their material preconditions. Moreover, in the actual process of this reflection, the ideological factors of necessity come to the fore. However, in answer to the question what is the decisive element in the genesis of law, Marxism replies: the socio-economic base of class society and the political structure arising from this base. Nor can it be otherwise, since the ideological preconditions for law are, ultimately, the reflection of the economic and political social bases. "The notion that *the ideas and conceptions of people create their conditions of life* and not the other way round is contradicted by all past history. . .", Engels wrote on the subject, and he went on to emphasise that "the same is true of the conceptions of law. . .".²⁸ But in bourgeois philosophy we encounter the opposite—the decisive role allotted to the ideal base of law which, moreover, is seen as being independent of the social being.

When Lassalle in his *System of Acquired Rights* allowed himself to be carried away by the idea of law, Engels made the rejoinder that even from the point of view of pure philosophy, Lassalle should have realised that "only the process is absolute, and not simply its temporary result, and had he done so he would never have discovered only legal idea but the historical process itself".²⁹ For in all the constructs based on the "idea of law", everything is turned upside down, history is relative, the idea is absolute. "While it is true that in the course of its evolution, the 'idea of law' suffered more than one heavy defeat, it eventually triumphed. The history of law is the march of the idea of law through history"³⁰—such is the claim made by H. Mitteis, a West German historian of law. Ideas of law, according to Mitteis, are not to be evaluated according to how much they have contributed to social and historical progress, on the contrary, the justification for the systems of law is the extent to which they relate to the idea of law.

As might be expected, the greatest embodiment of this idea is the law evolved by Western civilisation, that is, bourgeois

²⁸ F. Engels, *Anti-Dühring*, pp. 409, 410.

²⁹ Marx/Engels, *Werke*, Bd. 30, S. 203-04.

³⁰ H. Mitteis, *Die Rechtsidee in der Geschichte*, Weimar, 1957, S. 513.

law, although even here there were deviations (fascism being one) which, in the view of many natural-law supporters, happened because the natural-law idea had been all but consigned to oblivion. Bourgeois law in its natural-law presentation appears to the reader not as the product of the conscious activity of the classes dominant in the economic and political structure, but as the product of ideas, notions and values immanent in man. How can one think in terms of a radical reconstruction of society and of a fundamentally new type of law if the present bourgeois law is the embodiment of the higher principles of the ideal and the social consciousness and, consequently, can only be improved from within.

The question of the relation between natural and positive law has been posed more than once in the history of social and political thought. At different times, and especially at the time of the Enlightenment, the thesis that positive law was conditioned by the natural law acquired a forward-looking, revolutionary significance. A feature of the "renaissance" of natural law in the postwar years was not only and not so much its conservative tinge, for this has often been the case in the long history of the doctrine. The really novel feature, which first made itself felt at the beginning of the current century, but which blossomed out in this period, was that in the problem of the interrelationship between natural and positive law, the centre of gravity was shifted to the sphere of practical application. The problem of "natural and positive law" was now formulated in terms of "natural *or* positive law". The task which faced natural law, as expressed by Rommen, one of its more outspoken disciples, would henceforth be to nullify the role of the "sclerotic positive law". Henceforth natural law would be the functioning and really operative legal system; it would arm the judge in opposition to the legislator. Thus an essentially philosophical problem was reduced to purely operational terms.

"Law is the original, primary force, it does not derive from the state; the state is not the maker of law, in exactly the same way as it is not the exclusive product of law. The living force of law originates with man in the idea of law. The law idea is an independent, self-acting force. . . . Should any legislative act run counter to the idea of law, it cannot be

regarded as law. . . . The office with the final say in any conflict between the legislative act and the law is that of the judge."³¹ The foregoing construct is typical of West German legal writing throughout the decade immediately following the Second World War, and statements similar to those adduced here could be quoted endlessly. Moreover it is not a question of enabling the judge to arrive at his verdict in accordance with the law while taking into consideration criteria which, though extra legal, are nevertheless substantial (for example, moral criteria), not with making good any deficiencies in the law and certainly not with interpreting it; it is the much more ambitious idea of giving the judge the right to apply natural-law principles *contra legem*, that is, to refrain from applying the operative law to the particular case and to deliver judgement contrary to its prescriptions.

As proof of the allegedly democratic flavour of this procedure reference is frequently made to the practice actually followed in some cases by the West German and occupation courts immediately after the war, when the nazi laws and the activities of those officials who carried them out were condemned on the basis of natural-law concepts. But this harking back to the past is of little avail, since the judgement pronounced on the war criminals was not, in fact, the consequence of free judicial discretion, but had international law as its source. Karl Jaspers, with every justification, posed the issue in these terms: "What was the nature of the law on which the sentences were based? They were based on the law that brings all nations into association—on international law."³²

One has only to recall the alarm and disquiet which West German justice evoked among progressive public opinion (the problem of the ex-fascist judges, rehabilitation of war criminals, the outlawing of the Communist Party and persecution of the democratic forces) to appreciate the danger of investing

³¹ A. Schönke, *Einführung in die Rechtswissenschaft*, Karlsruhe, 1949, S. 1-3.

³² K. Jaspers, *Works* (Russ. ed.), p. 220. It is characteristic that the sentences passed by the Nuremberg Tribunal made no reference to natural law.

the judiciary with free discretion as set forth in natural law.

Natural-law teaching, more so than that of any other system, claims the right to be regarded as a source of law. Was it not the first to discover and proclaim the natural-law principles? Hence, so the claim goes, it is their source; hence its role is extended from formulating and developing law to the field of its application in practice. True enough, the practical significance of juridical science is no minor matter; but between this practical role of juridical science and its utilisation as a source of law in the juridical sense there is a fundamental dividing line. Contemporary bourgeois legal thought is growing more and more anxious to overcome this dividing line, and sees this as one manifestation of the fact that law cannot be reduced to the will of the state.

In the 1960s, the insistent demands of the natural-law teaching to invest the judge with wide-ranging powers to apply its principles *contra legem* were toned down somewhat and are now not so strident as they were in the first postwar decade. Positive and natural law are converging, and the court's application of "natural-law principles" is coming to be regarded as "continuation of the functions of the legislator".

"Natural law in positive law," such was the headline to an article by Messner in which he attacked the view of natural law being somehow or other on a higher plane than the contemporary legal reality. Positivism, according to Messner, bears the responsibility for this. "Natural law," he writes, "has a substantial place to fill in the historically formed legal order."³³ Although Messner agreed that the judge was bound by the law in the first place he stressed that in special cases the judge was fully entitled to have recourse to supra-law justice, and in doing so he was guided not only by his conscience but also by the "law-awareness of the given legal community".³⁴ The American jurist Jenkins sees the convergence of the two systems in a somewhat different light. In his view, social thought erred in rejecting the broad interpretation of the concept of "law", which

³³ OZOR No. 2, 1958, S. 130.

³⁴ Ibid., S. 139.

included juridical, moral and natural law. Agreement should be reached once more on all the different meanings attached to the term "law"; this would facilitate a return to the "time-honoured traditions" and to demolishing the barrier between the natural and the positive law.³⁵ Jenkins, however, fails to explain why, after all, the evolution of science led to differentiation with regard to the concept "law". Is the process accidental? Is it reversible?

Certainly the idea of a merger of the two normative systems is meeting with growing support among Western writers.³⁶ In a way, the merger is feasible, and is even under way, but only in the sense of the normative acts manifesting an ever greater diffusion of formulae and concepts, and indeterminate criteria deriving mostly from the natural-law teaching and court practice.

3. MARXISM AND NATURAL LAW

Bourgeois scholars who are opposed to natural law, particularly Kelsen, argue that since Marxism attaches the utmost importance to the social evaluation of existing law and recognises its dependence on the fundamental principles of the particular socio-political system, the Marxist conception of law must be seen as a variant of natural law, in other words, it is not an objective, scientific approach, but an ideologised approach to the domain of law.

Natural law supporters, on the other hand, accuse Marxism and socialist law of ignoring and failing to appreciate such an important value common to all mankind as natural law. H. Coing, professor of law in West Germany, who classifies legal teachings from the standpoint of their attitude to natural law and to the idea of law and justice, places the Marxist conception in the category of "nihilistic theories", and follows with the statement that this conception has no room for the "idea of law" as the expression of those ethical values towards

³⁵ J. Jenkins, "The Genesis of Positive Law," *ARSP* No. 1, 1964.

³⁶ See Zoltán Péteri, "Some Aspects of the 'Revived' Natural Law Doctrine". In: *Kritikai Tanulmányok a modern Dolgari jogelmé letről*, p. 289.

which law should aspire; his next point is that, according to Marxism, law is in some way or another merely a function of the economic process.³⁷

Neither of these views will stand up to criticism. The first is unsound, if only for the reason that Marxism rejects out of hand the idea of two normative systems—natural law and positive law—functioning in one and the same social system. In one society there can be only one system of law, its base is material. Marxism, taking as its starting point the causal association between the prevailing socio-economic conditions and law, and in terms of this association tracing the complicated objectively conditioned but at the same time class-volitional process of the transference of the social to the legal stands in no need of any *a priori* assumption of the existence and obligatory nature of the law in action.

Anything in the nature of a voluntarist approach to law is alien to Marxism, and the same is true of law in socialist society. While it emphasises the constitutive role of the state in giving expression to the class will in legislation, Marxism also takes into account that, in the last analysis, this will is determined by the material conditions of life in the particular society, that the state in exercising its law-making functions of the state is bound by the fundamental principles governing the given socio-economic system. If one examines the fundamentals of socialism in this light, i.e., as the factors governing the functions of the legislator, they could be taken as bearing a resemblance to natural law, which is what Kelsen does, since for him every meta-juridical, non-legal factor binding the legislator is at once natural law. In reality, of course, it is not a matter of the "natural" or of "law". The fundamental principles of any social system are a social concept, a concept which has nothing to do with man's "nature" but has everything to do with the organisation of people's life together, which is based on the historically changing mode of production. Taken by themselves, these principles are not a pre-established normative system, but the starting point and the recurring result of the motion of an intricate set of social relationships. It is another matter that under socialism the basic principles of the new society, now embodied in the con-

³⁷ H. Coing, *Grundzüge der Rechtsphilosophie*, Berlin, 1950, S. 98.

stitution, gain legal expression and figure as legal principles, as principles of right. For this transformation of the social into the legal, Marxism has no need whatever of natural law as a pre-established normative system.

The second view is incorrect because non-recognition by Marxism of natural law as a special supra-law normative system is regarded by the disciples of natural law as rejection of the range of problems contained in the doctrine. This is a profoundly mistaken view. Marxism has never regarded all the problems posed by natural law as being false. Many of them are examined by the Marxist science of law, understandably in the light of materialism, in its teaching on the rights of man and the dialectical unity of law consciousness and law. And if natural law is seen as a doctrine of the rights of man and the citizen, of ideas, values and their contribution to the evolution of law, then the Marxist teaching on legal consciousness, legal ideals, and the rights of man could merit, somewhat tentatively, the title of natural law in its materialist interpretation.

What distinguishes the Marxist theory of law from the bourgeois philosophy of law, including its natural-law variant, is not that the first-named denies and that the second grants the existence of ideas, ideals and values exerting influence on law, it is that, while in no way belittling the role played by these factors, Marxism denies them recognition as the well-springs of law and sees the corresponding categories not as *a priori*, innate, "eidetic", and so on, but simply as being conditioned by the social reality.

The questions of the evolution of legal ideas and notions as class and ideological processes and their dialectical association with law have been subjected to detailed investigation in Soviet writing on the subject and we shall not dwell on them here.³⁸ We recall merely that, contrary to the view expressed by Coing and many other writers on the philosophy of law, Marxism does not exclude even the "idea of law" concept as a substantial element of legal consciousness. Both law and the essential socio-economic and class-political factors

³⁸ See G. S. Ostroumov, *The Legal Awareness of Reality*, Moscow, 1969 (in Russian); I. E. Farber, *Legal Consciousness as a Form of Social Consciousness*, Moscow, 1963 (in Russian).

which objectively engender it have centuries of existence behind them, and for this reason alone the notion of the need for legal regulation was bound to take root in the social (and individual) consciousness, a notion which might well be described as the general notion of law, or idea of law. The latter term is, in our view, to be preferred, since in the hierarchy of those categories which for Marxist philosophy prepare the way to cognition, the idea takes priority over the notion. As pointed out by P. V. Kopnin, the idea expresses a regularity which characterises what is essential throughout a process, and is therefore appreciated sooner than details.³⁹ In this sense, the need for order and regulation in the social relationships in a state-organised society, expressed in the idea of law, is realised both in its general form and in detail in the aggregate of views, ideas and concepts embraced by legal consciousness. Obviously, the idea of law, as with legal consciousness generally, in the Marxist sense implies a materialist understanding of it as a reflection of the external world, of a particular kind of social system; it also implies understanding it as a class reflection of the given system.

If this is understood, the name we attach to the idea of law and, by the same token, to the general concept of law as reflecting features inherent in it throughout its evolution, is of no great importance. Denisov, criticising the natural-law approach for not considering legal systems as a reflection of the economic relationships, nevertheless grants the soundness of this approach in the sense that "in different epochs and among different nations law can have certain common and identical features. . . . A thorough, all-round study of law inevitably brings out general features, and leads to the formation of a general concept of law, and it does not matter what name is attached to it."⁴⁰

The charge that Marxism rejects the idea of the inalienable natural rights of man and citizen, to which the progressive trends in natural law attach so much importance, lacks any foundation whatever. In the light of the Marxist view on the regularities of social life, it would be wrong to regard

³⁹ *Philosophical Encyclopaedia*, Vol. 2, 1962, p. 236 (in Russian).

⁴⁰ *Works of the All-Union Law Academy*, 1947, Ed. 6, p. 32.

these rights as being derived from the will of the state, as a reflection of objective right. Marx returned again to right as the specific property of the individual, as deriving from his participation in the social process of production.⁴¹ In this respect Marxism, which associates the rights of man with his social being, is in close affinity with the revolutionary natural-law teaching on the inalienable rights of man. But whereas natural law deduces these rights from man's "natural nature", Marxism deduces them from his "social nature", that is, from his place in society and, above all, in the process of production. Natural-law teaching displays a liking for what Marx often referred to as "Robinsonades"; Marxism, however, prefers to see man—the bearer of law—as the "aggregate of the social relationships". Natural-law teaching regards as an absolute a particular system of rights (behind which stands man as a property-owner and the citizen entrepreneur). Marxism advocates the constant development of man's rights and freedoms, based on the social and economic development of society and on the transition from the capitalist formation to a formation of a higher order.

In a way, natural law has always been the purveyor of the criteria needed for evaluating the functioning law, the yardstick for measuring its justice, its "rightness". As mentioned earlier, even those spokesmen of the bourgeois science of law who look on the Marxist approach to law as a variety of juridicial positivism do not allege that rebuking Marxism takes a "non-evaluatory" attitude to law. This charge could be dismissed right away for the simple reason that Marxism from its very beginnings has always paid the utmost attention to serious social evaluation of bourgeois law with regard both to its content and to its place in history. Yet the charge that Marxism evaluates law chiefly on grounds of socio-economic criteria, while ignoring assessment based on higher ideals and values, is still maintained. Bourgeois critics have tried to exploit the fact that the socialist theory of law has made but slight use of the terminology of axiology, whereas the bourgeois philosophy of law, on the contrary, diligently builds various hierarchic systems of values.

⁴¹ For details see, L. S. Mamut, "Questions of Law in Marx's *Capital*", *Sovietskoye gosudarstvo i pravo* No. 12, 1967.

However, this exercise in semantics must not be allowed to overshadow the reality. For Marxist theory rejects not the value approach as such, but rather the idealist and teleological axiology with its separation of the world of values from the world as it really is, treating the former as the sphere of the subjective, indeterminate and, at times, of the irrational, so that the values instead of being listed among the social vectors of law appear as elements of its transcendental and teleological prerequisites. The materialistic value approach has always gone hand in hand with Marxism. "Basic to Lenin's approach to social phenomena and processes is the organic unity of scientific objectivity and principled assessment from working-class positions."⁴²

Marxism, we recall, is critical of bourgeois law not because of its being a reflection of the capitalist mode of production (indeed, it cannot be anything else) but because, as such, it is unjust to the millions of working people and allows no scope for realising those ideals and values lacking which life cannot be genuinely human and remains a life of alienation. As visualised by Marxism, the social life is measured by spiritual as well as material dimensions. Law, being a product of social life, necessarily embraces these spiritual dimensions and the ideals and notions of value that express them.

In the last century, Plekhanov criticised from the Marxist standpoint the German jurist Post, who maintained that law was purely a product of necessity or, to be precise, of need, and it was therefore useless "to seek in it any ideal basis whatsoever". Plekhanov, describing this as a harmful and confused view, stressed that law, being conditioned by the mode of production and by the human relationships deriving therefrom, always has *real foundations*. "But the *real foundations* of every given system of law do not exclude an *ideal attitude* towards that system on the part of the members of the given society. Taken as a whole, society only gains from such an attitude of its members towards that system. On the contrary, in its transitional epochs, when the system of law existing in society no longer satisfies its needs, which have grown in

⁴² *Theses of the Central Committee of the Communist Party of the Soviet Union on the Centenary of the Birth of Vladimir Ilyich Lenin*. Supplement to *New Times* No. 1, January 1, 1970, p. 44.

consequence of the further development of productive forces, the advanced part of the population can and must idealise a *new system of institutions*, more in keeping with the 'spirit of the time'".⁴³ In the course of history many progressive ideas of profound social significance in the context of a state-organised society made their appearance largely in the shape of legal ideals. Marxism, it goes without saying, is opposed to teleology and, accordingly, the Marxist theory of law is at variance with those juridical-axiological conceptions which tend to regard aims as the determining factors of law. However, while rejecting this teleological extreme and underlining the social determinacy of law, the Marxist view does not discount the significance of aims in the sphere of law and evaluates them from the standpoint of (a) what do the aims represent, (b) how are they realised. "The criterion for the evaluation of legal norms," writes D. Kerimov, "is not only the extent to which they reflect the material and spiritual reality but also the extent to which they transform the social relations which they regulate."⁴⁴ Professor A. M. Naschitz is correct in saying that "a nihilistic attitude to values is alien to the Marxist philosophy of law and to Marxist philosophy generally. While it must be acknowledged that Marxist law theorists have given little attention to the axiological question as the 'autonomous' object of their researches, the range of problems relating to it . . . have constantly figured in these researches, as it has also been reflected in the solutions offered to the various problems of the general theory of law".⁴⁵ This last circumstance is of special importance. It is important for legal studies to show how social ideals and values are embodied and concretised in law, in its basic institutions and the

⁴³ G. V. Plekhanov, *The Development of the Monist View of History*, 1972, pp. 150-51.

⁴⁴ D. A. Kerimov, *Categories of the Dialectic and Law*. Theses Submitted to the Conference on Problems of the Modern Development of Soviet Juridical Science, Leningrad, 1968, p. 9 (in Russian).

⁴⁵ Anita M. Naschitz, "Wert- und Wertungsfragen im Recht", *Revue roumaine des sciences sociales* No. 1, 1965, p. 2. See also, S.S. Alexeyev, *The Social Value of Law in Soviet Society*, Moscow, 1971 (in Russian); "Concerning the Law Concept", *Pravovedeniye* No. 1, 1970. Z. Peteri, "Die Kategorie des Wertes und das sozialistische Recht". In: *Wissenschaftliche Zeitschrift der F. Schiller-Universität Jena* No. 3, 1966, S. 427 ff.

manner of its application. This means that the axiological aspect must be examined simultaneously with the particular problem relating to the general theory of law. We have before us, then, not a particular object but only one aspect of the problems studied by the general theory.

At the same time the "autonomous" researching of the axiological aspects of law, necessitating as it does a preliminary elaboration of the problem of values in the Marxist philosophical literature, is also of great importance. In what amounts to a summing up of the results achieved in this sphere, the Soviet philosopher I. S. Narski writes: "Thus values are in the main *ideals of social* and, on this basis, also of individual *activity*, but some values are quite often the means of attaining others. Basic values belong not to the sphere of political economy but to the spheres of ideology and the teaching of historical materialism on social consciousness. What are ambiguously described as material values are not axiological values. . . . The dialectic of values lies, therefore, in the fact that if the higher values determine the means appropriate to their realisation (Marxism rejects the end-justifies-the-means argument), then the actual content of the higher values is determined by the means used to achieve these higher values."⁴⁶ It would seem that these propositions could be fruitfully applied to the sphere of law which, on the one hand, acts as the expressor of important values, and on the other hand, is itself an independent value alongside the other higher values.

4. "THE NATURE OF THINGS"

We turn now to the search for an ontology of law which, as we have seen, resulted in phenomenology and, especially, existentialism being eagerly taken up by bourgeois legal thought. But before examining this question we shall touch upon yet another instance of the search for an ontology of law which figured prominently in Western legal philosophy in the 1960s, namely, the "nature-of-things" concept—a kind of ontological analogue of natural law.

⁴⁶ I. S. Narski, *Dialectical Contradictions and the Logic of Cognition*, Moscow, 1969, p. 214 (in Russian).

Originally, this concept, which derives from the Sophists and the Stoics, was associated with natural-philosophy notions. It therefore contained elements of a spontaneous materialism, or to be more precise, could be interpreted in a materialist way (as it was by Spinoza and Montesquieu) although it was much more frequently subjected to idealist and teleological interpretation.

The modern bourgeois philosophers of law were, undoubtedly, attracted by the materiality of the "nature of things" concept. It was useful for conveying the impression of a break with the abstract idealism of the "idea of law" and the *apriorism* of transcendental logic and for opening up the "ontological perspective". Whereas natural law and the "idea of law" appear to be on a higher level than positive law and the legal order, the "nature of things" concept looks like the objective substance of law and its structural base. Whereas natural law is understood as an aggregate of principles, with which the functioning law and its basic institutions are compared, the "nature of things" is seen as the underlying base of the given legal institution or phenomenon, and not as a universal principle. This was the meaning given to the "nature-of-things" concept, when it was introduced in the last century into bourgeois jurisprudence by Jhering and Dernburg. Dernburg, a positivist, who ruled out the possibility of any practical application of natural law, held that the "nature of things" could be invoked to make up for the lacking in the positive law norms. Relationships, said Dernburg, themselves hold their own measure and their own order—it is this that is the "nature of things".

But modern Western legal philosophy has gone rather a long way from this somewhat simplistic attitude to the "nature of things". Investigation of the concept has yielded a number of constructs. Attempts to interpret it in any consistently materialist way have been very few. The call issued by N. Bobbio to replace the "much too vague" concept of the "nature-of-things" by that of economic and social function of legal institutions failed to muster support in Western legal literature. And Bobbio himself tended to proclaim the thesis rather than draw consistent conclusions from it.⁴⁷

⁴⁷ N. Bobbio, "Über den Begriff der 'Natur der Sache'", *ARSP* No. 3, 1958.

Just because a problem appears to be posed in a materialist way it does not mean that the argument will lead to a materialist conclusion. When the "nature of things" is defined as a collective concept indicative of all the factors which go into the determination of law,⁴⁸ this still does not indicate a materialist approach to the problem, since the real solution depends on what one understands as a determining factor, and what is the law it determines.

While not predominant, the neo-Kantian "nature-of-things" concept carries considerable weight. It appears to avoid the extremes of legal neo-Kantianism within the general frame of the neo-Kantian outlook. Radbruch,⁴⁹ for example, personified this approach. In his view the "nature of things" is, above all, a thought form for organising the "material of law". From the standpoint of method there is little to choose between this view and neo-Kantianism. The sole difference being that the latter is called upon *a priori* to invest reality with the trappings of law, while the "nature of things", evidently implies, as Radbruch assures us, the material which, as it were, surrounds law. The "nature of things", moreover, points to a possible realisation of legal ideas (resistance of the external world to realisation of these ideas) and to the "historical climate" which conditions a given legal idea.⁵⁰ Here there are signs of some attempt at a sociological orientation, which does not, however, go any further than a general posing of the question.

In their interpretations of the "nature of things", bourgeois writers tend to rely more on the current trends in philosophy than on neo-Kantianism. When they declare that the "nature of things" supplies the link between the legal norms and everyday life, one can rest assured that the life will be interpreted either in the spirit of the existentialist philosophy (as the foundation of law engendered by the concrete situation which a person experiences), or in the spirit of Hartmann's critical ontology (in which case the "nature of things" is located in the non-spatial-immaterial

⁴⁸ H. Henkel, *Einführung in die Rechtsphilosophie*, München, 1964, S. 294.

⁴⁹ G. Radbruch, "Die Natur der Sache als juristische Denkform", *Laun-Festschrift*, Hamburg, 1948.

⁵⁰ G. Radbruch, *Einführung in die Rechtswissenschaft*, S. 34-35.

tier of Hartmann's multi-tiered world of being), or as Scheler's transcendental values, or, lastly, in the spirit of Husserl's phenomenology, as the special being of juristic concepts—essences which are present before finding expression in the form of thought categories and becoming established in law, and are discovered by way of "eidetic social cognition".⁵¹

We shall return to some of these conceptions later. For the time being we confine ourselves to stating the obvious fact that the search for an ontology of law by way of the "nature of things" has not brought bourgeois legal philosophy a whit nearer to explaining the real determinant of the social base of law. What is more, the meaning attached to the concept frequently bars the way to any understanding of those aspects of the economic and political social structures which do, in fact, disclose the essence and the "nature" of law. Even in its attempt to give a social explanation of the "nature of things", understood as the "ontological base" of certain legal institutions, categories and concepts, bourgeois legal philosophy has failed to achieve any worthwhile results. Still, yet another formula has been found which can be counterposed both to legislation and to the existing law as a whole. After all, what difference does it make if the judge decides not to apply the law on grounds of its being at variance with natural law or because it is at odds with the "nature of things"? In some respects the second criterion is even more flexible since natural law is still associated with certain established principles whereas the "nature of things" has no such principles.

Nor can we fail to notice that there is hardly a single supporter of this conception who has not arrived at conclusions which leave room for use of the "nature of things" *contra legem*. According to W. Maihofer, positive law is obligatory for those who apply it only to the extent that it conforms to the "nature of things". In the hierarchy of law sources, the "nature of things", as a source beyond the boundaries of positive law, precedes legislative acts and other legal norms.⁵²

⁵¹ W. Maihofer, "Droit naturel et nature des choses", *ARSP* No. 2-3, 1965.

⁵² *ARSP* No. 2, 1958, S. 172-74.

According to some of the more moderate views, the non-correspondence between the legal norm and the ontological structure, while not rendering the norm inoperative, casts doubt on it and impairs its legitimacy. But who will have the final say on this point? Evidently it will be, as usual, the judge.

It may well be that some authors of liberal-democratic views, Maihofer, for example, see in the "nature of things" a means capable of resisting the more reactionary postulates of the operative bourgeois law, its conservatism and formalism. But it could play a positive role only if it clearly expressed the specific social and political factors which make for progressive social development. But there is no sign of such an approach. In bourgeois legal philosophy the "nature of things" is a vague and indefinite criterion, the social effect of which in the service of bourgeois class-justice is much the same as that of the other vague formulae facilitating the "free" use of discretion in the courts. There is a close analogy between the "nature of things" and that other notoriously elastic formula of "good faith" (*Treu und Glauben*).⁵³

In 1953, in the Federal Republic of Germany when, in keeping with the provisions of the Basic Law, the articles in the German Civil Code and other norms which had denied equal rights for both sexes were rendered null and void and a vacuum ensued in family law,⁵⁴ the Federal Constitutional Court took the step of restoring all the norms affirming the superior role of the husband as head of the family and investing him with the right to make decisions at his own discretion, on the grounds that such an arrangement of family life was in keeping with the "nature of things".⁵⁵

We have referred to the "nature of things" as an analogue of natural law. This is borne out by the resemblance between their functions and respective roles in relation to positive law. The "nature of things" is sometimes referred to, and

⁵³ K. Engisch, *Einführung in das juristische Denken*, Stuttgart, 1968, S. 190.

⁵⁴ The "vacuum" occurred because the Government Bills for replacing the obsolete laws were in such glaring contradiction to the constitutional articles concerning equality of the sexes that they were only passed by the Bundestag some years later in a slightly amended form.

⁵⁵ *Juristenzeitung* No. 5, 1954.

with good reason, as a specific type of natural law. Natural law is often described on the one hand as an offshoot of "human nature" and, on the other, of the "nature of things".

5. THE PHENOMENOLOGICAL SCHOOL OF LAW

More than half a century ago, A. Reinach made the first attempt to apply in the sphere of law some of the theses of phenomenology.⁵⁶ In the 1920s steps were taken in the same direction by F. Schreier, F. Kaufman and G. Hüsserl (not to be confused with Edmund Husserl, founder of the phenomenological school in contemporary bourgeois philosophy). This applies in particular to Schreier who advocated a combination of phenomenology and normativism.⁵⁷ Currently efforts are being made to revive this school.

As a trend in 20th-century bourgeois philosophy, phenomenology was noted for its anti-Kantian and, especially, for its anti-materialist outlook. Edmund Husserl himself claimed to occupy a neutral position over the basic problem of philosophy. His phenomenological method, however ("pure theory of knowledge")—the part of his philosophy seized upon by bourgeois legal thought was far from being neutral. Husserl insisted, first, that the object of knowledge should be things as they are and second, that knowledge of things should advance from the phenomenon to the essence. We do not dispute either of these points. The Marxist dialectical-materialist method likewise insists on studying objects and processes as they are found; for it, too, the consistent advance of human cognition from the phenomenon to the essence is obligatory. It is one of the basic propositions of Marxism that if phenomenon and essence were one and the same, all science would be superfluous.

Yet this coincidence in the original posing of the problem is purely superficial. To study a thing as it is, in Husserl's

⁵⁶ A. Reinach, *Die apriorischen Grundlagen des bürgerlichen Rechts, Jahrbuch für Philosophie und phänomenologische Forschung*, Bd. 1, Teil II, Halle, 1922.

⁵⁷ F. Schreier, *Grundbegriffe und Grundformen des Rechts*, Leipzig und Wien, 1924; F. Kaufman, *Die Kriterien des Rechts*, Tübingen, 1924; G. Hüsserl, *Recht und Welt*, Tübingen, 1929.

view, is to regard it in complete isolation; all the rest of the world is, as he expressed it, to be "enclosed in brackets", in other words, ignored. The thing cognised is sealed off from historical, economic, psychological and all other associations and ties. With Marxism, the materialist method of proceeding from the phenomena to the essence is that of disclosing the object in all its varied associations, direct and indirect (for example, the essence of law can be discovered only through understanding how it is conditioned by the social and economic and the class and political factors). With phenomenology, cognition of the essence is a process of intuitional guessing (reduction) of the ideal base of the particular phenomenon—the "eidos"—which reveals itself to the consciousness. "Essences" as understood by phenomenology are something akin to the Platonist realm of ideas, with the sole difference that they lack the independent existence enjoyed by Plato's "ideas of things" and exist only in the intentional connection between the object and the cognising subject. Husserl, we recall, never applied this schema to law. Epistemologically his conception of the cognition of essences may be largely attributed to his having modelled it on examples drawn from the mathematical sciences.

But how does this conception look when applied to law by Reinach (whose teaching seems to have gained a new lease on life in bourgeois legal philosophy), or by Gardies, Azevado, Real and other bourgeois philosophers of law?

From the standpoint of the phenomenological school, the juristic concepts, categories and norms exist before they are perceived by man and assume the form of logical categories and before they are formulated in law. "As with numbers, trees and buildings, legal institutions exist independently of the people who perceive them and their interpretation by positive law. They are not the creation of the latter, just as historical events are not the creation of historical science," so writes Gardies, one of the latter-day disciples of Reinach.⁵⁸ Earlier still, in the 1920s, Schreier asserted that "the legal norms exist regardless of whether or not they have been proclaimed as such by any legislator; they exist, but their life is not that of nature, it is the life of the concept. The life of

⁵⁸ *AphD*, Vol. VII, 1962, p. 176.

the concept is beyond time, and that which is beyond time cannot be made. . . . Laws, if we may say so, are not invented in the manner of the steam engine. . . . they are discovered in the way that the laws of mathematics are discovered".⁵⁹

How, then, are we to understand this special life experienced by the juristic concepts, categories and norms prior to their appearance in law? Actually the discussion has nothing whatever to do with the world of reality, nothing to do with social life in which (either independently of people's consciousness or through their deliberate influence, including influence in the shape of law) there are indeed engendered new relationships which in due course are registered in law. To quote Gardies once more: "Ever since there have been jurists trying to describe their functions in philosophical terms whenever they have offered explanations of the processes that accompany law-making, they have placed the accent either on human will, or on an empirical 'nature of things', or on the historical, geographic, economic or social settings, or on an *a priori* legal structure."⁶⁰ Gardies goes on to draw a distinction between the phenomenological existence of law in the form of an *a priori* structure, on the one hand, and its social causes and premises on the other. He comes out in favour of legal concepts, categories and institutions having an *a priori* existence as "substances", "essences" or "eidoses" which reach the consciousness through a special "perception of essences" (*Wesenschau*). The totality of the eidoses forms the so-called *a priori* law (not to be confused with the neo-Kantian *a priori* concept of law). This "*a priori*" or "eidetic" law comes before both positive law and legal consciousness, but until such time as the "legal eidos" comes within the vision of consciousness and, hence, becomes the object of phenomenological scrutiny, it remains somehow without existence, since for phenomenology the life of the essence derives from the interaction of subject and object. The moment the phenomenological school recognises the independence of the "legal eidos", it falls into the embrace of neo-Platonism: the moment it deduces the existence of essence from the interaction between subject and object, it is back once more at neo-Kan-

⁵⁹ Schreier, *op. cit.*, S. 45.

⁶⁰ *AphD*, Vol. VII, 1962, p. 197.

tianism. In any case, the slogan "back to things" and, correspondingly, the slogan "back to law" turn out to be something of a sham.

Generally speaking, the ideological process that takes place in the mind of the Hüsserlian jurist can be explained without undue difficulty. Basically it has its source in the fact that in different conditions and legal systems we encounter concepts, norms and institutions of a like nature. And instead of explaining this fact as being due to a coincidence of social factors, the query is advanced as to why similar norms and institutions in different legal systems nevertheless manifest certain differences. The general is taken out of its brackets and seems to acquire an independence of its own; it becomes the universal, immanent substance (to use the concepts of medieval realism with which phenomenology has a close affinity), and thereafter into something that precedes things, i.e., the norms and institutions of the functioning system of law. For the Hüsserlian jurist the operative law is deduced from the "eidetic". In reality his "eidetic law" is nothing but a mystified projection of the operative law.

Hegel noted that the criterion of the natural laws was beyond us, and that our cognition of these laws added nothing to them and did nothing whatever to further them; in fact, our cognition of these laws was the only thing that could be widened or increased. "Cognition of law," he wrote, "is also, on the one hand, such and, on the other, is not such. Juridical laws are laws made by man."⁶¹ This distinction between the natural and the legal is, in effect, ignored by the phenomenological school and in its view, as we have seen above, there is no basic difference between the "eidetic" perception of a tree or of a legal institution. The result, in sum, is that the conscious activity of people, of social groups, classes and the state, that is, the very processes out of which the legal concepts and norms emerge disappear from the genesis of law. Gardies creates confusion by making a comparison between the legislator and the historian who describes events. It would be more logical to compare the work of the historian with that of the professor of law. The function of the state is to make law, not to describe it.

⁶¹ Hegel, *Sämtliche Werke*, Bd. VII, S. 24.

The phenomenological school has features which make it a suitable apologist for bourgeois law. Of special interest, for example, is the all-inclusive comparison of bourgeois norms with the laws of mathematics, with the result that norms buttressing a certain kind of social relationships namely the capitalist (it will be recalled that most of the phenomenological school's examples derive from bourgeois civil law), assume almost the same universality as, say, the multiplication tables. "Eidetic law," both asserts the truth of bourgeois law and provides it with a method of making necessary adjustments by way of doctrine and the judge. After all everybody, not merely the professional law-maker, has the right to engage in the search for the "legal eidós", which is basic to any norm or institution that may be applied. As Hüsserl has it: "The last word in matters of law interpretation cannot be left to the will of the legislator,"⁶² it rests with the idea of the law that is being applied.

True, the supporters of the phenomenological view are cautious in identifying eidetic law with natural law. For them the "eidetic" is in closer affinity with the "nature of things".⁶³ As we have seen, however, in practical terms this does not add up to much.

As an independent school in its own right, legal phenomenology, while it has failed to make any considerable headway, makes its presence felt now and then as a component of a complicated eclectic system. It is felt, for example, in the "egological teaching" of K. Cossio and in the constructs of other Latin American lawyers (L. Siches, E. Maynez), in the sociological law of Gurvitch and in Coing's philosophy of law. As was the case in the 1920s, we still meet with attempts to use the phenomenological approach as philosophical backing for Kelsen's normativism.⁶⁴ The influence of phenomenology is also perceptible in existentialism, including the law aspect of existentialism.

⁶² G. Hüsserl, *Recht und Zeit*, Frankfurt am Main, 1955, S. 26.

⁶³ W. Maihofer, *Droit naturel et nature du choses*, p. 233.

⁶⁴ P. Amslek, *Méthode phénoménologique et théorie du droit*, Paris, 1964. Kelsen himself was sceptical about this attempt (*OZOR* No. 4, 1965), just as in the 1920s he took a negative view of the works of Schreier and Kaufmann.

6. EXISTENTIALISM IN LAW

Unlike phenomenology, which relies on essence for its ontological base and legal structure, existentialism places its trust in the category of existence (while retaining much of the phenomenological method as a gnosiological approach to an understanding of existence). For existentialism the problem of problems is man—his existence and his mission. The basic question of philosophy—man in relation to the external world—appears in existentialism as the question of man's relationship to society.

Existentialist philosophy has little to do with the subject of law. In fact, it never essays an explanation of law as a category. To do so would, in effect, be contrary to the whole sense of a philosophy for which law (according to Jaspers, for example) is but one of the external factors in opposition to existence, that is, to the real life of man.⁶⁵

The first point here is that, seen in this aspect, law, if it is of any significance for existence, is entirely negative and, secondly, it appears in the form of a rather traditional normative system set up by authority. Moreover, law in Jaspers' view, has meaning for existentialism only indirectly, by way of the influence it exerts on the "non-genuine existence". It is merely a means of regulating the total order of things in which the individual is obliged to live his existentialist life. The strictly existentialist view of the legal categories is invoked by Jaspers over question of guilt and responsibility and even here only in association with their "non-genuine existence".

As distinct from existential philosophy, existentialism in law claims that law has its origins in "being"—that is, existence. Law appears as a new phenomenon produced by the existentialist life of the individual and his solutions of specific situations. Basically, then, we have before us yet another variant of the "living law" as opposed to the ossified and non-genuine official law.

However, interpretation of law as an existentialist cate-

⁶⁵ See K. Jaspers, *Philosophie*, Bd. II, 1956, S. 240-41. Jaspers has written more on the subject of law than any of the other existentialist philosophers.

gory is a logical impossibility, that is, if it remains strictly within the frame of existentialist philosophy. Law is a category of the social, and it makes sense only insofar as it concerns relations among people. But, from the standpoint of philosophical existentialism, "existence" becomes real only as a result of its isolation from the life of society. "Existence", as an opportunity for man to become what he actually is, is realised only in solitude, in "self-being". Society deprives man of his self, of his essence, and separates him from his genuine existence; the personality must part company with the world of social life, suppress the common, everyday individual that has been imposed upon it from without. Consequently, before it could become the basis of a legal theory, the concept of "existence" had to be substantially reconstructed.

Mainhofer, for example, advances the new concept of the "*Alsein*" as something half way between empirical (everyday) existence and true "existence". The existence of the individual in the everyday world is not only something unique and inimitable, it is also an existence in which the world takes part.⁶⁶ Fechner develops a long line of arguments concerning the need for some kind of link between isolated individual existence and social existence.⁶⁷ Thus in legal existentialism, man's existence is connected to a much greater extent with the existence of other men than it is in philosophical existentialism. Maihofer's "*Alsein*" as something half way between existence and the empirical world is not the same thing as Jaspers' "borderline-situation". It is, however, no more than a situation in which two or more isolated individuals encounter one another, and the determining factor in their "conjunction" is the existence of each. The "Robinsonade" is resolved in a purely formal manner, since what happens is simply an encounter between two or more marooned Crusoes.

Individuals, finding themselves in a situation in which each means something to the other, expect a certain kind of

⁶⁶ W. Mainhofer, *Recht und Sein, Prolegomena zu einer Rechtsontologie*, Frankfurt am Main, 1954, S. 114.

⁶⁷ For details see *Against the Contemporary Legal Ideology of Imperialism*, pp. 158 ff; *Sovietskoye gosudarstvo i pravo* No. 6, 1958, pp. 122 ff.

behaviour from each other in conformity with their particular interests. This need forms the basis of an obligation associating one individual with the other. "Any law has its source in a situation". Law engendered by a situation is a genuine law (since it goes back to the beginning of beginnings, that is, the existence of man), whereas positive law, "congealed" law, can be regarded as obligatory only in the event of its coinciding with the "genuine law". But to qualify for this standing, its applicability to the particular situation must first be verified, since situations are subject to change. All this is surprisingly reminiscent of the conclusions reached by Petrazycki, although his approach to this ultimate model of law differs substantially from that of the existentialists.

If law is the resolving of a particular situation, engendered by an existence of the "*Alssein*" type, the question arises as to how one decides whether decision reached in the particular situation is correct, if only for the reason that because when two or perhaps more existences are involved, there are grounds for more than one decision. True, the operative law could be taken as the criterion. The West German existentialist Tissen grants that the individual involved in a situation is guided, among many other things, by the existing legal norms (which, as a consequence, "come alive"). Other jurists totally reject this view and, as criteria of the rightfulness of a decision situation, suggest natural law and the "nature of things". Both notions are as vague as they are complicated. Fechner, falling back on natural law, declares that this is a specifically "existentialist" natural law, which is in a process of uninterrupted dynamism. Its content derives from the correct existentialist resolving of legal conflicts. How does he justify the soundness of the decisions? This gives rise to the need for yet another kind of natural law, for the primary existentialist natural law, and so on *ad infinitum*. But how can something whose content is for ever changing be a criterion? The Fechner construct obviously does not stand up even to criticism in its own terms. And as for Maihofer's "nature-of-things" concept, since it never emerges from the boundaries of the particular situation (it is the ontological base of the situation, and no more), the ultimate result is that the situation engendering the law merges with the con-

cept itself. As we have already noted, Dernburg expressed this conclusion in much simpler and clearer terms: every relationship carries within itself its own measure and its own order.

Existentialism in law diverges from the pathway of "legal idealism". Its basic premises on the need to seek the groundwork of law in human existence arouses no objection as such, but the more important thing is how one understands human existence. Is it possible to discover how law is conditioned by existence, given even the wider interpretation of existence? Generally speaking, if one were to start by posing the question of man's destiny and the meaningfulness of his existence (the existentialist point of departure) extending the concept of "existence" to take in the being of the solitary man (and his associations with others) to the life of the social man and even to social life as such, one could ultimately arrive at an understanding of the essence of law as a social phenomenon. Legal existentialism, however, has not passed many milestones along this road. The "situation" in which it sees the cornerstone of law does not emerge from the confines of the microworld.

Some of the left-oriented existentialist jurists, trying to come to terms with Marxism, argue that in his earlier writing Marx, too, took as his starting point the individual and the problem of how to overcome his alienation. But the whole point is that Marx writes in terms of man in society (man as the aggregate of the social relationships) and his association with other men in society, groups, classes and, lastly, society as an entity comprised of more than one social class yet constituting an integrated economic and political organisation. In other words, in the Marxist view, the "micro-life" has no existence outside the main, fundamental social macrostructures as the ontological base of law. Man is a part of this base, but as a participant in wide-ranging and manysided associations which, in their totality, add up to what we know as society. Existentialism, however, never goes as far as the macrostructure, with the result that it is unable to depict law as it really is. We say nothing of the point that the man-law relationship is interpreted in such an individualistic way that the vital "class-law" relationship disappears altogether.

Existentialism in law is regarded as a kind of "a juridical impressionism".⁶⁸ It can furnish sketches of the complicated process of the movement of concrete law relationships, but portrayal of the overall legal reality, based on the new approach to the subject to which its advocates lay claim, seems to be wholly beyond its reach. It shies away even from the problem of the reciprocal influence exerted by law on this "life base". Law is restricted to once-only solutions to situations and amounts to no more than the settlement of conflicts. Obviously it would be absurd to rebuke legal existentialism on the grounds that it omits such aspects of the reciprocal influence exerted by law as the providing of models of organisation and behaviour. The existentialist would reply that it is these established models to which existentialism is opposed. But even his existentialist law fails to exert any reciprocal influence on the formation and engendering of situations; it is deprived of any active social role (just as it denies any such role to law in general). The idea of law as an instrument of social change is obviously quite alien to existentialist legal thinkers, since existentialist philosophy stipulates that no social transformations or evolution will ever enable man to turn life into the kingdom of reason and the rational.

Kelsen was wrong in assuming that the resort to existentialism in the sphere of law was merely a lowing to the current philosophical fashion.⁶⁹ And while it is true that the philosophical fad played its part, the turn towards existentialism reflected one of the more stable trends in 20th-century bourgeois legal thought—rejection of the general norms in favour of specific solutions to specific situations. We have observed this tendency in practically all the 20th-century bourgeois law teachings reviewed in this work. And nothing could have been more indicative than the philosophical conception of existentialism.

Whereas the phenomenological school relies chiefly on the categories of phenomena and essence treated in the spirit of philosophical-idealist realism, legal existentialism

⁶⁸ *V. I. Lenin on the Socialist State and Law*, Moscow, 1969, p. 306 (in Russian).

⁶⁹ *ARSP* No. 2, 1957.

gives pride of place to the categories of the individual, and the general, and the former—the concrete situation, or legal case—is interpreted as being irreducible to the latter—the general rule or norm. But where does the general come from if it has nothing to do with the process of ascending from the particular to the general, the process in which the logical coincides with the historical? To this question legal existentialism has no answer. It concentrates entirely on the existentialist mechanism of the occurrence of particular situations, which it then opposes to the norms. “According to our conception,” we are told by G. Cohn, “the centre of gravity is located in the concrete situation; from it comes all law and all value; it is the situation which imparts to the legislative acts and other law sources their significance and their very existence. It attracts them to itself and leaves them inactive when it is not in need of them.”⁷⁰ It is quite true that the norm requires for its application an actual case, in the shape of a particular situation to which the given law applies. This, however, provides no grounds for saying that the norm is merely a simple reflection of the situation to which it is presumed to apply. Nevertheless this appears to be the somewhat naive presumption on which Cohn relies. The norm is the consequence of a series of social factors. Its purpose is not merely to reflect a given situation, but also to influence the situation, or rather, the behaviour of people out of which legally significant situations usually arise. As an active regulative factor any norm conveys the legislator’s aims arising from his understanding not just of the situation to which the particular norm applies, but also of a broad range of social relationships and situations which condition both the general law-making policy and its refraction in specific problems and relationships. Moreover, since the legal norm is always part of the legal system, any appreciation and application of it outside the context of its general principles would be no easy matter. These principles would never have been reflected in the

⁷⁰ G. Cohn, *Existenzialismus und Rechtswissenschaft*, Basel, 1955, S. 44. Cohn holds that the free-law school was even then not sufficiently free. For further details of the Cohn book, see *Revue des sciences sociales* No. 2, 1963.

norm, if the norm were merely the reflection of the particular situation for which it was designed in the first instance. If one were to follow Cohn's advice, to invest the judge with powers to revise the norm in conformity with each concrete situation, then law, clearly, would lose its capacity to influence the social relationships, and remain no more than a rather arbitrary means of resolving conflicts.

Juridical existentialism draws attention to the important matter of the individual's role and behaviour in the sphere of law. It underlines the fact, true in a mystified way, that man being not merely the object of law regulation, can play a significant part in its development and consequently in developing society as a whole. The interpretation of law as a means of resolving situations could be most attractive if one could see it as a summons to the individual to relinquish his conformist abidance by the norms of bourgeois law and enter the lists against its injustice. We must not forget, however, that the theories of juridical existentialism are far from being postulates of a democratic nature. In themselves these theories have the same negative implications for the principle of legality as do other trends in the "autonomous law movement". The basic point of vulgar existentialism (the Cohn conception, in particular) is the same old free judicial discretion. And other existentialist-law thinkers, too, when they speak of resolving situations, have in mind solution by the judge and a corresponding search on his part for existentialist law, a fact which substantially modifies the notion of the active part played by the individual in law. Soviet legal writing stresses that the existentialist philosophy of law proposes no active efforts to bring democracy into the law as it exists, but merely a different form of relationship between the citizen and the law and, what is more, it turns out to be a form which, if accepted as an absolute, could be used, no less than normativism, to justify any arbitrary action.⁷¹

⁷¹ V. Zheltova, "Existentialism and the Crisis of the Bourgeois Philosophy of Law", *Uoprosy filosofii* No. 12, 1969, p. 84.

CONCLUSION

Modern bourgeois legal theories show signs of stagnation, which is part of a more general process associated with the chronic crisis of bourgeois ideology as a whole. This situation is a source of concern to many bourgeois jurists. They find it painful that over the years their science has failed to make any really worthwhile progress, that despite the multiplicity of conceptions and schools, the solutions of vital theoretical problems still elude them, and that there is a growing contradiction between the traditionally large share of attention devoted to law education and the inability of legal science to answer the questions that interest the young generation.

It is typical of the ideological atmosphere accompanying the general crisis of capitalism that the sense of bewilderment and even alarm is intensified by an inward disbelief (often concealed by noisy declamation) in the potential of law.

What is the cause of this stagnation? Should it be sought, as some of the legal experts suggest, in purely subjective

factors, in the reluctance to adopt new methods, in the intrigues of positivism against natural law and vice versa?

The crisis is chronic because it is constantly reproduced by the state and law realities of capitalist society, the sum total of those complex processes taking place in the political superstructure, in the constitutional mechanism, in law and in justice.

This reproduction proceeds along two lines. On the one hand, a deliberate creation of theories (or rather, apologies) designed to substantiate and justify the above-mentioned processes as the only right and possible ones inasmuch as they correspond to the dynamism of the times, etc. On the other hand, it may be not so much a deliberate act as an unconscious acceptance of processes that have been going on so long that they seem to be inevitable and justified. In both cases, the conclusions provided by science run counter to the aims reinforcing those democratic law principles which alone could endow it with social value.

The steady progress made by socialist law has deepened the crisis currently experienced by its bourgeois counterparts. The principles, aims and major institutions of socialist law do not fit into the traditional pattern of bourgeois jurisprudence and this in itself is a refutation of the theses on which the bourgeois doctrines are based. A science that in this day and age still takes only capitalist society as its model for solving vital theoretical problems or, even worse, sets out to present law in such a way as to contradict the Marxist theory of the law and state, is bound to be out of step with the objective course of history. So history has to be distorted to prove the unsoundness of Marxism-Leninism.

Like bourgeois ideology as a whole, 20th-century bourgeois legal theory has failed to yield anything in the nature of a stable system of ideas. In the first quarter of the century, due to the efforts of Duguit, Oriu and other writers, a complex of ideas, designed to respond to the new requirements, found expression in such slogans as "solidarism", "overcoming individualism", "obligation of property", the "social function of law" and so on. The ideas, however, failed to survive their compilers; many of them characteristically enough proved suitable for incorporation into the fascist ideology and were thus completely compromised.

Later, in the aftermath of World War Two, and especially with the rise of the world socialist system, a search had to be made for new slogans and new ideas and the crop was certainly abundant; but the scientific value of jurisprudence depends not on quantity but on the extent to which an idea expresses the true pattern of state and legal development. The revivals of old ideas that figure as the chief instrument of contemporary bourgeois legal thought are by no means the same as the spiral of development known to science, which implies returning to a problem at a new and higher level of knowledge. Here, on the contrary, solutions of the new problems are sought in the shadows of the antiquated.

Modern bourgeois legal thought is powerless when confronted with issues which test its social potential, its ability to define the way forward for law. It totally rejects the logical advance from the bourgeois to the socialist type of law and, ideologically, hinders in every way this historically necessary process.

There is a complete lack of any satisfactory answer to the question of a democratic evolution of law in capitalist society. The prevailing idea of judge-made law has, in the most serious way, compromised the very principle of legality, thus hindering the efforts of the working people, within the limits of their anti-monopoly actions, to impart a democratic content to the constitution and to the legal system as a whole.

The more complex the political structure of society becomes and the greater the constantly growing role of the state in public life, the greater the importance of defining the role of law in the political structure, its interaction with the other political departments and, above all, with the state mechanism. The predominance in present-day bourgeois legal thought of the primacy-of-law idea and of legal pluralism distorts the actual state of affairs in modern capitalist society.

Throughout the 20th century, bourgeois theoretical-legal thought has been rather like the man on the flying trapeze, swinging wildly from one basic line of thought to another but never coming up with anything that could possibly be described as new. In the 1950s the "revived" natural law suc-

ceeded in elbowing out positivism, but by the time the 1960s came along positivism, due to the process of formalising scientific knowledge, had made the return swing (especially in its neological and semiotic variants) and, evidently, will in the near future seat itself more firmly in the saddle.

At the same time we encounter from time to time in bourgeois theoretic studies tendencies in the direction of a materialist approach to law, due no doubt to Marxist influence. Certainly, more frequently now than in the past, we meet with unprejudiced though not always successful attempts to make a closer acquaintance with Marxism.

But, as is evident from what has been set forth above, these tendencies and these efforts are far from being typical of the contemporary bourgeois theory of law.

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Engels described the juridical world outlook as the "classical world outlook of the bourgeoisie". The present work traces the evolution of this world outlook in modern times and analyses the leading trends in the modern theory and philosophy of law in the West. The book expounds many of the vital theses of Marxist theory concerning the essence of law.

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